SUPREME COURT, U.S.
FILED

(1) 98 225 AUG 3 1998

OFFICE OF THE CLERK

No._____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1997

STATE OF MICHIGAN, et. al.,
Petitioners,

v

UNITED STATES DEPARTMENT OF ENERGY, et. al.,
Respondents. /

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR WRIT OF CERTIORARI

FRANK J. KELLEY
Attorney General
State of Michigan
Thomas L. Casey, Solicitor General
Counsel of Record
David A. Voges
Henry J. Boynton
Larry G. Watterworth
Patricia S. Barone
Assistant Attorneys General
760 G. Mennen Williams Building
P.O. Box 30212
Lansing, MI 48909
Telephone: (517) 373-1124
Attorneys for Petitioners State of Michigan, and Michigan Public Service Commission

(Additional Counsel for Petitioners
are Listed at the end of the Appendix)

179 pp

QUESTIONS PRESENTED

I.

Whether the Court of Appeals' determination that the Nuclear Waste Policy Act ("NWPA") does not impose an enforceable statutory duty upon the Department of Energy ("DOE") to dispose of nuclear waste from commercial nuclear power plants beginning not later than January 31, 1998, conflicts with the plain language of the NWPA and the clear intent of Congress in enacting that statute?

II.

Whether the Court of Appeals' refusal to exercise its jurisdiction to remedy the DOE's refusal to comply with its statutory duty to dispose of nuclear waste, violates the duty imposed upon the Court of Appeals to act as the sole forum for review of the DOE's action or inaction under NWPA § 119.

LIST OF PARTIES

The parties before this Court in this Petition for Certiorari are:

Petitioners

Alabama Public Service Commission, Arizona State Corporation Commission, State Of Arkansas, Arkansas Public Service Commission, California Public Utilities Commission, State Of Connecticut, Connecticut Department Of Public Utility Control, State Of Delaware, Florida Public Service Commission, State Of Florida, State Of Georgia, State Of Indiana, Iowa Utilities Board, Illinois Commerce Commission, State Of Illinois, State Of Iowa, State Of Kansas, Commonwealth Of Kentucky, Louisiana Public Service Commission, State Of Maine, State Of Maryland, Commonwealth Of Massachusetts, State Of Mississippi, New Jersey Board Of Public Utilities, New York State Public Service Commission, Maryland Public Service Commission, Michigan Public Service Commission, State Of Michigan, Minnesota Department Of Public Service, State Of Minnesota, Minnesota Public Utilities Commission, Mississippi Public Service Commission, Missouri Public Service Commission, National Association Of Regulatory Utility Commissioners, Pennsylvania Public Utility Commission, State Of Nebraska, State Of New Hampshire, New Hampshire Office Of The Consumer Advocate, North Dakota Public Service Commission, North Carolina Utilities Commission, Public Systems Group, Public Utilities Commission Of Ohio, State Of Rhode Island And Providence Plantations, South Dakota Public Utilities Commission, Public Service Commission Of South Carolina, State Of Vermont, Vermont Public Service Board, Commonwealth Of

Virginia, Wisconsin Public Service Commission, Kansas Corporation Commission.

Respondents

United States Department Of Energy, Secretary Of The United States Department Of Energy, United States Of America.

The parties in the consolidated proceedings below before the United States Court of Appeals for the District of Columbia Circuit were:

Northern States Power Co., et. al. v U.S. Department of Energy, et. al.,
Case No. 97-1064.

Petitioners

Northern States Power Company, Florida Power and Light Company, Duke Power Company, Vermont Yankee Nuclear Power Corporation, Niagara Mohawk Power Corporation, GPU Nuclear, Inc., Jersey Central Power & Light Company, Metropolitan Edison Company, Pennsylvania Electric Company, Wisconsin Public Service Corporation, Union Electric Company, Detroit Edison Company, Public Service Electric and Gas Company, Florida Power Corporation, Wolf Creek Nuclear Operating Corporation, Kansas Gas and Electric Company, Gas City Power & Light Company, Kansas Electric Power Cooperative, Inc., Indiana Michigan Power Company, PECO Energy Company, Virginia Electric and Power Company, Consumers Power Company, Baltimore Gas and Electric Company, Centerior Energy Corporation, Consolidated Edison Company of New York, Inc., Duquesne Light Company, Midamerican Energy Company, New York

Power Authority, Pennsylvania Power & Light Company, Entergy Operations, Inc. (on its own behalf and as agent for Entergy Arkansas, Inc., System Energy Resources, Inc., South Mississippi Electric Power Association, Entergy Louisiana, Inc., Entergy Gulf States Utilities, and Cajun Electric Power Cooperative), Rochester Gas and Electric Corporation, Texas Utilities Electric Company, Carolina Power & Light Company, Pacific Gas and Electric Company, Commonwealth Edison Company, Boston Edison Company.

Respondents

United States Department of Energy and The United States of America.

Intervenors

IES Utilities, Inc., Central Iowa Power Cooperative, Corn Belt Power Cooperative, Northeast Utilities Service Company, Connecticut Yankee Atomic Power Company, North Atlantic Energy Service Corporation, American Public Power Association, Piedmont Municipal Power Agency, Connecticut Municipal Electric Energy Cooperative, Massachusetts Municipal Wholesale Electric Company, Florida Municipal Power Agency, The New Hampshire Electric Cooperative, Inc. The Electric Department of the City of Burlington Vermont, The Electric Department of Braintree Massachusetts, City of Anaheim California, City of Riverside California, City of Banning California, City of Azusa California, Arizona Corporation Commission, National Association of Regulatory Utility Commissioners, Virginia State Corporation Commission, Louisiana Public Service Commission.

State of Michigan, et. al. v U.S. Department of Energy, et. al.,
Case No. 97-1065.

Petitioners

State Of Michigan, Michigan Public Service Commission, State Of Minnesota, Minnesota Department Of Public Service, Minnesota Public Utilities Commission, State Of Connecticut, Connecticut Department Of Public Utility Control, State Of Florida, Florida Public Service Commission, Arkansas Public Service Commission, Commonwealth Of Massachusetts, Maryland Public Service Commission, South Dakota Public Utilities Commission, Missouri Public Service Commission, State Of Delaware, Wisconsin Public Service Commission, State Of Kansas, Kansas Corporation Commission, Iowa Utilities Board, California Public Utilities Commission, State Of Vermont, Vermont Public Service Board, New York State Public Service Commission, Pennsylvania Public Utility Commission, Alabama Public Service Commission, Commonwealth Of Kentucky, State Of Rhode Island And Providence Plantations, State Of Arkansas, State Of Maryland, New Hampshire Office Of The Consumer Advocate, State Of New Hampshire, State Of Nebraska, State Of Iowa, New Jersey Board Of Public Utilities, State Of Illinois, Illinois Commerce Commission, State Of Georgia, State Of Mississippi, Mississippi Public Service Commission, North Dakota Public Service Commission, Commonwealth Of Virginia, State Of Indiana, Public Service Commission Of South Carolina, North Carolina Utilities Commission, State Of Maine, Public Utilities Commission Of Ohio, Virginia State Corporation Commission, National Association Of Regulatory Utility Commissioners, Public

Systems Group, Arizona State Corporation Commission, Louisiana Public Service Commission.

Respondents

United States Department Of Energy, Secretary Of The United States Department Of Energy, United States Of America.

Intervenors

IES Utilities, Inc., Central Iowa Power Cooperative, Corn Belt Power Cooperative, Northeast Utilities Service Company, Connecticut Yankee Atomic Power Company, North Atlantic Energy Service Corporation, "Public Systems Group" (the American Public Power Association, Piedmont Municipal Power Agency, Connecticut Municipal Electric Energy Cooperative, Massachusetts Municipal Wholesale Electric Company, Florida Municipal Power Agency, New Hampshire Electric Cooperative, Inc., the Electric Department of the City of Burlington, Vermont, the Electric Light Department of Braintree, Massachusetts, and the Cities of Anaheim, Riverside, Banning and Azusa, California).

Illinois Power Company v Department of Energy,
Case No. 97-1370.

Petitioner
Illinois Power Company.

Respondents
United States Department of Energy and The United States of America.

Yankee Atomic Electric Co. v U.S. Department of Energy,

Case No. 97-1398.

Petitioner
Yankee Atomic Electric Company.

Respondent
United States Department of Energy.

In Re: Maine Yankee Atomic Power Co., et al.,
Case No. 98-1069.

Petitioner
Maine Yankee Atomic Power Company.

Respondent
U.S. Department of Energy .

In Re: Southern Nuclear Operating Co., et al.,
Case No. 98-1070.

Petitioner
Southern Nuclear Operating Company, Wisconsin Electric Power Company, Omaha Public Power District, Nebraska Public Power District.

Respondent
U.S. Department of Energy.

Southern California Edison Company v Department of Energy,
Case No. 98-1201.

Petitioner
Southern California Edison Company.

Respondent
Department of Energy.

Washington Public Power Supply System and South Carolina Electric & Gas Company v Department of Energy,
Case No. 98-1213.

Petitioner
Washington Public Power Supply System and South Carolina Electric & Gas Company.

Respondent
Department of Energy.

Dairyland Power Cooperative v Department of Energy and United States of America,
Case No. 98-1284.

Petitioner
Dairyland Power Cooperative.

Respondent
Department of Energy and United States of America.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

LIST OF PARTIES ii

INDEX OF AUTHORITIES xi

OPINIONS BELOW 1

JURISDICTION 2

STATUTORY PROVISIONS 4

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 7

I. The Issues In This Case Are Of Significant National Importance Requiring This Court's Review 7

II. The Court Of Appeals' Determination That The Nuclear Waste Policy Act Does Not Impose An Enforceable Statutory Duty Upon The Department Of Energy To Dispose Of High Level Radioactive Waste And Spent Nuclear Fuel From Commercial Nuclear Power Plants Beginning Not Later Than January 31, 1998, Conflicts With The Plain Language Of The NWPA And The Clear Intent Of Congress In Enacting That Statute 11

III. The Court Of Appeals' Refusal To Exercise Its Jurisdiction To Remedy The DOE's Refusal To Comply With Its Statutory Duty To Dispose Of High Level Radioactive Waste And Spent Nuclear Fuel, Violates The Duty Imposed Upon The Court Of Appeals To Act As The Sole Forum For Review Of The DOE's Action Or Inaction Under NWPA § 119 19

RELIEF SOUGHT 23

APPENDIX

Northern States Power Company, et al., Petitioners
v.
United States Department of Energy and United States of America, Respondents.....1a

Order No. 97-1064 (May 5, 1998) 15a

Order No. 97-1064 (May 5, 1998) 17a

Order No. 97-1064/98-1213 (July 2, 1998).....22a

Order No. 97-1064/98-1284 (July 2, 1998) 25a

Indiana Michigan Power Company, et al., Petitioner
v. *Department of Energy and United States of America*, Respondents 27a

Department of Energy final interpretation of nuclear waste acceptance issue 38a

42 U.S.C.A. § 10222 .....57a

42 U.S.C.A. § 10139 .....66a

Department of Energy Standard Contract for Disposal of Nuclear Spent Fuel and/or High Level Radioactive Waste 68a

INDEX OF AUTHORITIES

CASES

Commonwealth Edison Co. v Dep't. of Energy,
877 F.2d 1042 (D.C. Cir. 1989) 12

Griffin v Oceanic Contractors, Inc.,
458 U.S. 564; 102 S. Ct. 3245;
73 L. Ed. 2d 973 (1982) 18

Haggar v Helvering,
308 U.S. 389; 60 S. Ct. 337;
84 L. Ed. 340 (1940) 17

Indiana Michigan Power Co. v Dep't of Energy,
88 F.3d 1272 (D.C. Cir. 1996) ..... 1, passim

Louisiana Public Service Comm. v Federal Communications Comm.,
476 U.S. 355; 106 S. Ct. 1890;
90 L. Ed. 2d 369 (1986) 18

Northern States Power Co. v U.S. Dep't of Energy,
128 F.3d 754 (D.C. Cir. 1997) ..... 1, passim

Public Citizen v Department of Justice,
491 U.S. 440; 109 S. Ct. 2558;
105 L. Ed. 2d 377 (1989) 18

Rendelman v Bowen,
860 F.2d 1537 (9th Cir. 1988) 12

Tennessee v Herrington,
806 F.2d 642 (6th Cir. 1986)
cert. denied , 480 U.S. 946 (1987) 13

U.S. v Hatcher,
922 F.2d 1402 (9th Cir. 1991) 12

STATUTES

5 U.S.C. § 706(1) 6

28 U.S.C. § 1254(1) 3

28 U.S.C. § 1651(a) 6

28 U.S.C. § 2201 6

Nuclear Waste Policy Act ("nwpa"),
42 U.S.C. § 10121 et. seq..... i, *passim*
42 U.S.C. § 10131(a)(1)(A) 26
42 U.S.C. § 10131(a)(1)(B) 26
42 U.S.C. § 10139 ..... 4, *passim*
42 U.S.C. § 10222(a)(5)(B) ..... 4, *passim*

ADMINISTRATIVE ORDERS AND REGULATIONS

10 C.F.R. § 961.11 *et. seq.* 6

Final Interpretation of Nuclear Waste Acceptance Issues, 60 Fed. Reg. 21,793 (1995) 2, 5, 15

MISCELLANEOUS

1982 U.S. Code Cong. and Ad. News, Vol. 4, p3795 13

Congress of the United States, Office of Technology Assessment, Managing Commercial High Level Radioactive Waste (April, 1982) 13

H.R. 97-491 (I), p. 29 (April 27, 1982) 13, 14

OPINIONS BELOW

1. The published Opinion of the Court of Appeals for the District of Columbia Circuit, granting State Petitioners Limited Mandamus, was decided and filed on November 14, 1997, and is reported at 128 F.3d 754 (D.C. Cir. 1997); it is also reprinted in the Appendix. App. to Pet. 1a.

2. The unpublished Orders of the Court of Appeals for the District of Columbia Circuit, denying the Petitions for Rehearing, Suggestion for Rehearing En Banc and Motions for Enforcement of Mandamus, were filed on May 5, 1998, and are reprinted in the Appendix. App. to Pet. 15a, 17a.

3. The unpublished Orders of the Court of Appeals for the District of Columbia Circuit, ending its retention of jurisdiction and barring State Petitioners from seeking any further relief before the District of Columbia Circuit, were filed on July 2, 1998 and are reprinted in the Appendix. App. to Pet. 22a, 25a.

4. The published Opinion of the Court of Appeals for the District of Columbia Circuit, reversing the U.S. Department of Energy's administrative decision, was decided and filed on July 23, 1996, and is reported at 88 F.3d 1272 (D.C. Cir. 1996), it is also reprinted in the Appendix. App. to Pet. 27a.

5. The published decision of the Department of Energy was decided on April 23, 1995, and is reported at 60 Fed. Reg. 21,793 (1995); it is also reprinted in the Appendix. App. to Pet. 38a.

JURISDICTION

The opinion of the District of Columbia Circuit was decided and filed November 14, 1997. Timely Petitions for Rehearing and a Suggestion for Rehearing En Banc were filed and denied by Orders of the District of Columbia Circuit, dated May 5, 1998. This Petition for Certiorari is filed within 90 days of that May 5, 1998 Order.

This Court has jurisdiction under 28 U.S.C. § 1254(1) to review the final judgment or decree of the Court of Appeals for the District of Columbia Circuit.

Since the United States is a party, the Solicitor General is included among the parties served, in accordance with Supreme Court Rule 29.4.

STATUTORY PROVISIONS

This case concerns the interpretation and application of the following statutory provisions, all of which are reproduced in the Appendix:

1. The Nuclear Waste Policy Act, § 302, as enacted, 42 U.S.C. § 10222. App. to Pet. 57a.

2. The Nuclear Waste Policy Act, § 119, as enacted, 42 U.S.C. § 10139. App. to Pet. 66a.

STATEMENT OF THE CASE

This case arises from extended efforts by State Petitioners to enforce the Nuclear Waste Policy Act ("NWPA"), 42 U.S.C. § 10121, et. seq., and the decision of the Court of Appeals for the District of Columbia Circuit in *Indiana Michigan Power Co. v Dep't of Energy*, 88 F.3d 1272 (D.C. Cir. 1996). App. to Pet. 27a. Under the NWPA, the U.S. Department of Energy ("DOE") is solely responsible for the permanent disposal of high level radioactive waste and spent nuclear fuel (collectively "SNF"). To implement the federal government's SNF disposal program, Congress in 1982 created a comprehensive scheme in the NWPA which, *inter alia*, required utilities operating nuclear power plants to remit payments to the Nuclear Waste Fund ("NWF") to cover the DOE's costs of siting, constructing and maintaining a disposal facility. The utilities in turn recover the costs of such payments from ratepayers in rates set by state commissions or other authorities. In return for these payments into the NWF, the NWPA required the DOE to dispose of SNF beginning not later than January 31, 1998. NWPA § 302(a)(5)(B); 42 U.S.C. § 10222(a)(5)(B). App. to Pet. 59a.

In *Indiana Michigan*, the Court of Appeals considered petitions filed by the State Petitioners and utilities owning and operating nuclear power plants ("Utility Petitioners) which sought declaratory relief and review of DOE's April 28, 1995 *Final Interpretation of Nuclear Waste Acceptance Issues*, 60 Fed. Reg. 21,793 (1995). App. to Pet. 38a. In its

Final Interpretation, the DOE concluded that in the absence of an operating disposal facility it had no statutory or contractual[1] obligation to begin disposing SNF by the January 31, 1998 deadline established in the NWPA. The Court reversed and vacated DOE's *Final Interpretation*, holding that DOE has an unconditional obligation, reciprocal to the payment of fees, to begin disposing SNF no later than January 31, 1998. The Court of Appeals then remanded the matter to DOE for further proceedings consistent with its decision. 88 F.3d at 1277. App. to Pet. 37a.

The DOE neither appealed nor sought rehearing of *Indiana Michigan*. Nor did DOE undertake action to comply with the NWPA or the Court's decision. Instead it announced it would not meet the January 31, 1998 deadline. As a result, on January 31, 1997, State Petitioners and Utility Petitioners again filed separate Petitions for Review in the Court of Appeals, which were then consolidated by the Court. Both petitions sought enforcement of the NWPA and of the Court's ruling and remand order in *Indiana Michigan*.[2] On April 30, 1997, the Court of Appeals *sua sponte* issued an order that required the Petitioners to refile their petitions,

---

[1]The NWPA required the Secretary of Energy to enter into contracts with utilities owning nuclear power plants. The Standard Contract adopted by the DOE is set forth at 10 C.F.R. § 961.11 *et. seq.*, and is reproduced in the Appendix. App. to Pet. 68a.

[2] In its Petition for Review, the State Petitioners invoked the Court's jurisdiction under Section 119 of the NWPA, 42 U.S.C. § 10139, Administrative Procedures Act, 5 U.S.C. § 706(1), Declaratory Judgment Act, 28 U.S.C. § 2201, and the All Writs Act, 28 U.S.C. § 1651(a). The petitions also requested: a declaratory ruling that payments to the NWF could be placed in escrow unless and until DOE met its obligations to dispose of SNF; an order of mandamus requiring DOE to adopt a plan and to take steps to meet the statutory and contractual deadline of January 31, 1998 to dispose of SNF; and, related relief.

within one week, as Mandamus Petitions. On May 6, 1997, State Petitioners and Utility Petitioners filed their Petitions for Mandamus. Upon further briefing and argument, the Court of Appeals on November 14, 1997 issued its decision in *Northern States Power Co. v U.S. Dep't of Energy*, 128 F.3d 754 (D.C. Cir. 1997). App. to Pet. 1a.

The Court of Appeals in Northern States reiterated its prior holding in *Indiana Michigan*, that under Section 302(a)(5)(B) of the NWPA, the DOE has an unconditional obligation to begin disposing SNF by January 31, 1998. 128 F.3d at 756-758. App. to Pet. 8a, 9a. The Court of Appeals found that the Petitioners had established a clear right to relief and that the DOE's duty to act could hardly be more clear. However, it issued only a limited mandamus, and declined to issue the broader writ of mandamus, finding instead that "the remedial scheme of the Standard Contract offers a potentially adequate remedy" for DOE's breach. 128 F.3d at 758-759. App. to Pet. 9a. The Court remanded Petitioners to their remedies under the Standard Contract and determined that it would "retain jurisdiction over this case pending compliance with the mandate issued herewith." 128 F.3d at 761. App. to Pet. 14a.

On December 29, 1997, following the Court of Appeals' *Northern States* decision, the DOE filed a Petition for Rehearing with a Suggestion for Rehearing *En Banc*. Petitioner Yankee Atomic Power Company also filed for rehearing. In the DOE's rehearing pleadings, the DOE reiterated that it would not take SNF and took the position that it intended to use money from the NWF (money that was ultimately paid by the ratepayers and deposited in the NWF so that DOE could perform its unconditional obligation) to pay for injuries resulting from DOE's failure to perform. In light of that disclosure, the State Petitioners, on February 2,

1998, filed a Motion for Enforcement that requested, *inter alia*, the Court to issue an order barring DOE from carrying out its threat to use NWF funds and fee payments made by the utilities and ratepayers to pay the utilities for their costs resulting from DOE's failure to begin disposing SNF by the January 31, 1998 deadline.[3] The Utility Petitioners filed a similar Motion to Enforce Mandate on February 14, 1998.

On May 5, 1998, the Court of Appeals issued two orders. The first order denied the DOE's Suggestion for Rehearing *En Banc*. App. to Pet. 15a. The second order denied both DOE's and Yankee Atomic's Petitions for Rehearing as well as the Motions for Enforcement filed by the State Petitioners and Utility Petitioners. App. to Pet. 17a. In its denial of the rehearing petition filed by Yankee Atomic, the Court's May 5, 1998 order essentially nullified the unconditional obligation of the statute and earlier decisions in Indiana Michigan and Northern States by finding that it had no jurisdiction to remedy DOE's failure to act, stating: While the statute requires the DOE to include an unconditional obligation in the Standard Contract, it does not itself require performance. Breach by the DOE does not violate a statutory duty; thus, our jurisdiction to hear allegations of failure to take an action required under the NWPA, see 42 U.S.C. § 10139(a)(1)(B), does not provide a basis for a move-fuel order. App. to Pet. 20a.

---

[3]The State Petitioner's Motion sought further relief including the requirement that the DOE file a plan identifying how and when it would commence compliance with the NWPA and the Court's decisions; the appointment of a Special Master to monitor DOE's compliance; and an order authorizing the payment into escrow accounts of utility and ratepayer payments to the Nuclear Waste Fund pending DOE compliance with its duty to begin disposing SNF.

On July 2, 1998, the Court of Appeals issued two orders with respect to new Petitions for Review and for a Writ of Mandamus that were filed following the DOE's default on January 31, 1998. App. to Pet. 22a, 25a. The Court ordered these new cases consolidated with *Northern States* (Case No. 97-1064) and held that all cases in this consolidated matter were concluded, and no further relief could be sought. In so doing, the Court terminated its review under NWPA Section 119, and ended its retention of jurisdiction pending DOE compliance, which the Court had provided for in its November 14, 1997 decision in *Northern States*, 128 F.3d at 761. App. to Pet. 14a.

This Petition for Certiorari is filed within 90 days of the May 5, 1998 Order Denying Rehearing.

REASONS FOR GRANTING THE WRIT

I. The Issues In This Case Are Of Significant National Importance Requiring This Court's Review.

The Court of Appeals below has decided an important question of federal law that has not been, but should be, settled by this Court. Review is necessary to ensure that the purposes and goals of the NWPA are carried out and that the nation is provided with a timely and safe nuclear waste disposal program, as Congress intended. The State Petitioners seek review of holdings by the Court of Appeals that defeat these Congressional goals and purposes.[4]

4NWPA § 111(b), 42 U.S.C. 10131(b) states the purposes of the NWPA are:

> (1) to establish a schedule for the siting, construction, and operation of repositories that will provide a reasonable

Specifically, State Petitioners seek review of the Court of Appeals' determination that it lacks the authority to enforce the NWPA's unconditional statutory obligation that DOE dispose of SNF beginning not later than January 31, 1998. See II, *infra*. The petition also seeks review of the Court of Appeals' refusal to exercise its jurisdiction under NWPA § 119, to remedy DOE's refusal to comply with its statutory duty to dispose of SNF beginning not later than January 31, 1998. See III, *infra*.

Congress, in the NWPA, responded to the fact that SNF is highly radioactive, and must be handled with extreme care in order to protect the public health and safety. Utilities, at the encouragement of Congress have, starting about 1960, built over a hundred nuclear power units at a cost of more than $100 billion. Today, the operating nuclear power units are an integral element of the nation's economy supplying about 20 percent of U.S. electrical power. Each utility has expanded or will have to expand their SNF storage capability

---

assurance that the public and the environment will be adequately protected from the hazards posed by high-level radioactive waste and such spent nuclear fuel as may be disposed of in a repository;

(2) to establish the Federal responsibility, and a definite Federal policy, for the disposal of such waste and spent fuel;

(3) to define the relationship between the Federal Government and the State governments with respect to the disposal of such waste and spent fuel; and

(4) to establish a Nuclear Waste Fund, composed of payments made by the generators and owners of such waste and spent fuel, that will ensure that the costs of carrying out activities relating to the disposal of such waste and spent fuel will be borne by the persons responsible for generating such waste and spent fuel.

to accommodate DOE's delay. This is due to the fact that when the plants were originally designed, there was no expectation that all the SNF ever produced might remain on site to the end of each plant life. With the effective elimination of any definite federal policy or schedule, State Petitioners and the nation are deprived of a fundamentally important component of the NWPA, the unconditional obligation of the DOE to perform in a timely manner. The DOE's continued failure to perform will result in the establishment, by default, of nuclear waste sites at 72 different locations throughout the nation next to lakes, rivers and streams which were never chosen, evaluated or qualified for long-term storage, or permanent disposal of SNF. Estimates of the costs accommodating the DOE's delay range into the tens of billions of dollars, including the potential economic shutdown of some units plus increased costs for the decommissioning. All the while the fees and interest payments into the NWF continue to grow at a rate of approximately $1 billion per year in addition to the $15 billion that has already been collected.

Reliance on the DOE to perform its unconditional obligation, in the absence of any future Court order, offers cold comfort. DOE's actions demonstrate a purposeful DOE policy to avoid its unconditional obligation under the NWPA, despite the fact that DOE has the capability and ability to comply with the statute.[5] Without this Court's review, the

---

[5]The DOE has consistently charted a course to delay its promised date to begin to accept SNF and since 1993 to avoid not only its obligation to take SNF, but also liability and costs resulting from its failure to act. These actions range from its denial in the *Final Interpretation* of its responsibility to act by a date certain, to its "unavoidable delay" defense, to its intended use of NWF monies to pay damages, all the while refusing to begin disposing SNF. DOE has also amply demonstrated its capability to accept SNF. DOE currently transports, accepts, and stores other SNF, including SNF from 41 foreign countries and certain domestic sources.

State Petitioners, indeed the nation, are left with only the DOE's promise that it will begin disposal, without any reliable plan or indication as to when DOE will perform.

Unlike many other cases this Court reviews, where there is a conflict in the federal circuits, or between state and federal courts, regarding a principle of law, the important issues here will be presented to this Court only by this petition. In this case, original and exclusive jurisdiction is in the Court of Appeals pursuant to NWPA §119. However, there will not likely be any future time when a conflict between circuits, or between state and federal courts, will occur with respect to the issues presented here. The Court of Appeals' reversal of its earlier rulings regarding DOE's statutory duties under the NWPA, and its curtailment of its review duties under § 119, will likely be presented to this Court only in this case.

State Petitioners therefore seek from this Honorable Court a decisive remedy for DOE's failure to act in accordance with its duties under the NWPA and a reasonable timeframe for the commencement of performing those duties. This Court should vindicate the statutory intent of Congress in enacting the NWPA by reversing the Court of Appeals' decisions, with the requirement that the lower Court implement effective remedies to enforce the NWPA.

II. The Court Of Appeals' Determination That The Nuclear Waste Policy Act Does Not Impose An Enforceable Statutory Duty Upon The Department Of Energy To Dispose Of High Level Radioactive Waste And Spent Nuclear Fuel From Commercial Nuclear Power Plants Beginning Not Later Than January 31, 1998, Conflicts With The Plain Language Of The NWPA And The Clear Intent Of Congress In Enacting That Statute.

From 1954, when the Congress first authorized and promoted civilian use of atomic energy, until 1982 when the NWPA was enacted, Congress had failed to come to grips with the enormity of the nuclear waste disposal problem. Moreover, successive federal administrations failed repeatedly to bring about any solution. Congress' passage of the NWPA in 1982 finally, and with considerable effort, represented a national consensus relative to the federal government's role and commitment to dispose of SNF from commercial nuclear power plants. See NWPA § 111(a) and (b), "Findings" and "Purposes"). In this regard, it was noted that "[a]lthough there [was] not unanimous agreement on all elements of the federal program, there [was] a solid

consensus on the need for legislation to solidify a program and keep it on track." H.R. 97-491 (I), p 29 (April 27, 1982); 1982 U.S. Code Cong. and Ad. News, Vol. 4, p 3795.[6] Under the NWPA, in recognition of the need to keep the SNF disposal program on track and as a *quid pro quo* for the payment of fees, DOE was to dispose SNF, beginning not later than January 31, 1998. NWPA § 302(a)(5)(B). App. to Pet. 59a. DOE, however, attempted to evade this duty by claiming it was conditioned on the existence of an operational repository. See Final Interpretation. App. to Pet. 38a.

In *Indiana Michigan*, the Court of Appeals reversed and vacated DOE's *Final Interpretation* and held that Congress had spoken unambiguously and that "under the plain language of the statute," NWPA § 302(a)(5)(B), the DOE's duty to perform by January 31, 1998 was "without qualification or condition." It stated:

---

[6]In a penetrating study advising Congress on overcoming past failure, the Office of Technology Assessment ("OTA") indicated that the establishment of a firm schedule for the development of disposal facilities was critical to securing a credible national policy for the disposal of SNF. Congress of the United States, OTA, Managing Commercial High Level Radioactive Waste (April, 1982), Report Summary, p 47.

[7] Moreover, the Standard Contract is far more akin to a regulation in the manner and procedure by which it was adopted. *Edison Co. v. Dep't of Energy*, 877 F.2d 1042 (D.C. Cir. 1989). The Standard Contract was not the subject of negotiations between parties of equal power but was written by DOE pursuant to a rulemaking-type procedure. In this context, the Standard Contract must comply with the statute, and the agency may not use the contract to undermine the statute. Furthermore, in similar circumstances, where conditions of a contract do not arise from a freely negotiated agreement between parties but rather are the result provided for by statute, Courts, have looked to the statute, rather than common law contract principles in determining the government's obligations involved in the matter. See *U.S. v. Hatcher*, 922 F.2d 1402 (9th Cir, 1991); *Rendelman v. Bowen*, 860 f.2d 1537 (9th Cir. 1988).

> **[Congress]. . . . directed the beginning of the Secretary's duty as "not later than January 31, 1998," without qualification or condition.** The only limitation placed on the Secretary's duties under (B) is that that duty is "in return for the payment of fees established by this section." The Department's treatment of this statute is not an interpretation but a rewrite. It not only blue-pencils out the phrase "not later than January 31, 1998," but destroys the *quid pro quo* created by Congress. It does not survive the first step of the *Chevron* analysis. 476 U.S. at 842-43, 104 S.Ct. at 2781-82. Under the plain language of the statute, the utilities anticipated paying fees "in return for [which] the Secretary" had a commensurate duty. She was to begin disposing of the high-level radioactive waste or SNF by a day certain.

88 F.3d at 1276. App. to Pet. 35a - 36a (emphasis added).

The Court in *Indiana Michigan* held that DOE had a clear statutory duty to begin disposing SNF commencing January 31, 1998. In reaching this holding, and rejecting DOE's arguments, the Court found, as the 6th Circuit had also found, that the NWPA evidences Congressional intent that DOE perform its duties in a timely manner:

> It does not make sense to assert that Congress would express an intent to exempt DOE from the January 31, 1998 deadline by including specific statutory procedures regarding the siting and development of a repository in the NWPA. Rather, these prerequisites evince a strong congressional intent that DOE's various obligations be performed in a timely manner. See, e.g., *Tennessee v. Herrington*, 806 F.2d 642, 648 (6th Cir. 1986) ("[T]he overall structure of the Act

> does reveal a consistent concern for timely implementation of the disposal provisions."), *cert. denied*, 480 U.S. 946, 107 S.Ct 1604, 94 L.Ed.2d 790 (1987).
>
> * * *
>
> In conclusion, we hold that the petitioners' reading of the statute comports with the plain language of the measure. In contrast, the agency's interpretation renders the phrase "not later than January 31, 1998" superfluous. **Thus, we hold that section 302(a)(5)(B) creates an obligation in DOE, reciprocal to the utilities' obligation to pay, to start disposing of the SNF no later than January 31, 1998.** The decision of the Secretary is vacated, and the case is remanded for further proceedings consistent with this opinion.

88 F.3d at 1277. App. to Pet. 36a - 37a (emphasis added).

DOE did not seek rehearing, nor did it appeal the Court's *Indiana Michigan* decision. Nevertheless, the DOE failed to act to comply with its duties under the NWPA as interpreted by the Court in *Indiana Michigan*. The Petitioners then filed a Petition for Review below on January 31, 1997 seeking judicial enforcement of *Indiana Michigan*. In the ensuing decision in Northern States, the Court again found that DOE had a statutory duty to begin disposing SNF by the 1998 deadline. The Court reiterated this stating:

> As we pointed out in Indiana Michigan, the NWPA directs DOE to undertake the duty to begin taking SNF by January 31, 1998.

128 F.3d at 760. App. to Pet. 12a. The Court in *Northern States* also rejected DOE's defense that its delay was

"unavoidable" and issued a limited mandamus precluding DOE from asserting same.

> Accordingly, we order DOE to proceed with contractual remedies in a manner consistent with NWPA's command that it undertake an unconditional obligation to begin disposal of the SNF by January 31, 1998. More specifically, we preclude DOE from concluding that its delay is unavoidable on the ground that it has not yet prepared a permanent repository or that it has no authority to provide storage in the interim.

128 F.3d at 760. App. to Pet. 12a - 13a.

The Court of Appeals in *Northern States* further upheld the congressional mandate that DOE had a statutory duty to perform when it ordered that DOE not implement certain interpretations of the Standard Contract, stating:

> This necessarily means, of course, that DOE not implement any interpretation of the Standard Contract that excuses its failure to perform on the grounds of "acts of Government in either its sovereign or contractual capacity." 10 C.F.R. § 961.11, Art. IX.A. **We held in Indiana Michigan that the NWPA imposes an unconditional duty on DOE to take the materials by 1998. Congress, in other words, directed DOE to assume an unqualified obligation to take the materials by the statutory deadline. . . DOE has no authority to adopt a contract that violates the directives of Congress,** just as it cannot implement interpretations of the contract that contravene this court's prior ruling. **We hold that this provision in the Standard Contract,**

> **insofar as it is applied to DOE's failure to perform by 1998, is inconsistent with DOE's statutory obligation to assume an unconditional duty.**

128 F.3d at 760 (emphasis added). App. to Pet. 13a. The Court of Appeals, however, then declined to enter a meaningful mandamus order or enforce the unconditional statutory duty:

> In conclusion, we do not grant petitioners' broad request for a writ of mandamus because we conclude that the remedial scheme of the Standard Contract offers a potentially adequate remedy. We do, however, grant the petition in part because DOE has not abided by our prior conclusion that the NWPA imposes an unconditional obligation on the Department to begin disposal of the SNF by January 31, 1998. We therefore issue a writ of mandamus precluding DOE from excusing its own delay on the grounds that it has not yet prepared a permanent repository or interim storage facility. We retain jurisdiction over this case pending compliance with the mandate issued herewith.

128 F.3d at 761. App. to Pet. 13a, 14a.

On May 5, 1998, the Court of Appeals issued an Order denying the rehearing petitions filed by the DOE and Yankee Atomic and the Motions for Enforcement filed by the State Petitioners and the Utility Petitioners. In stark contrast to the Court's final unappealed decision in Indiana Michigan and its mandamus decision in Northern States, the Court held:

> **While the statute requires the DOE to include an unconditional obligation in the Standard Contract,**

> **it does not itself require performance.** Breach by the DOE does not violate a statutory duty; thus, our jurisdiction to hear allegations of failure to take an action required under the NWPA, see 42 U.S.C. § 10139(a)(1)(B), does not provide a basis for a move-fuel order.

App. to Pet. 20a (emphasis added).

This retreat from statutory duty to deferable contractual obligation clearly contradicts the Court's earlier holdings in *Indiana Michigan and Northern States Power*. Furthermore, it comprises a full retreat from any potential enforcement of either the NWPA or the Court's prior decisions. See Argument III, *infra*.

The Court's holding that Section 302(a)(5)(B) of the NWPA required only the printing of an unconditional obligation in the Standard Contract, but did not require the execution of that obligation is flatly at odds with the very essence of the *quid pro quo* that the Court had so strongly emphasized in *Indiana Michigan and Northern States*. It conflicts with the very purpose of the NWPA, by finding that the NWPA was only about the words to be inserted in a contract, and not about actual performance by the federal government. It ignores the entire statutory scheme and intent of the NWPA that there be a definite and timely federal solution to nuclear waste disposal, which was emphasized in *Tennessee v Herrington*, 806 F.2d 642, 648 (6th Cir. 1986) *cert. denied*, 480 U.S. 946 (1987), and which was forcefully noted by the Court of Appeals in *Indiana Michigan*. 88 F.3d at 1277. App. to Pet. 37 a.

All statutes must be construed in light of their purpose. *Haggar v Helvering*, 308 U.S. 389, 394; 60 S. Ct.

337; 84 L. Ed. 340 (1940). A reading of the statute that would lead to an absurd or odd result is to be avoided, especially when it can be given a reasonable application consistent with its words and with the legislative purpose. *Id.*, See also *Public Citizen v Department of Justice*, 491 U.S. 440, 454; 109 S. Ct. 2558; 105 L. Ed. 2d 377 (1989); *Griffin v Oceanic Contractors, Inc.*, 458 U.S. 564, 572; 102 S. Ct. 3245; 73 L. Ed. 2d 973 (1982). Here, the purpose of the NWPA is unmistakable. It is to require the DOE to begin disposing SNF not later than January 31, 1998. The Court of Appeals' new reading of the NWPA, that Section 302(a)(5)(B) creates only a contractual obligation and no duty to timely perform, produces a result that is demonstrably at odds with the intentions of Congress. What appears to be lost upon the Court of Appeals is that Congress' purpose of imposing an unconditional obligation on the DOE was to require performance. The Court of Appeals' order to the contrary just as effectively blue pencils out the intent of Congress in enacting the NWPA as the DOE did in its "rewrite" of the statute in the *Final Interpretation*, which the Court of Appeals justifiably condemned in *Indiana Michigan*. See 88 F.3d at 1276. App. to Pet. 35a - 36a.

Under the Court of Appeals' decision, the contract will now take precedence over the DOE's unconditional statutory obligation, expressly required by Congress in the NWPA. This result would turn traditional concepts of the relationship of agencies to Congress on its head. As this Court stated in *Louisiana Public Service Comm. v Federal Communications Comm.*, 476 U.S. 355, 374-375; 106 S. Ct. 1890; 90 L. Ed. 2d 369 (1986):

> An agency may not confer power upon itself. To permit an agency to expand its power in the face of a

> congressional limitation on its jurisdiction would be to grant to the agency power to override Congress.

In short, the Standard Contract as drafted by DOE, and as now interpreted by the Court, delegates to DOE all aspects of performance without any effective accountability, timeliness, or incentives to perform.[7]

Finally, the Court of Appeals' reliance on the Standard Contract to overturn the statute is even more paradoxical because the Standard Contract itself, even as unilaterally drafted by DOE, does not provide any basis for such a result. The far more reasonable interpretation is that the Standard Contract was intended by Congress to be a vehicle for further enforcing the federal duties and commitment under the NWPA. Notably, the Standard Contract likewise required the DOE to begin disposing SNF by January 31, 1998. Art. II, App. to Pet. 78a. The Standard Contract also defined a facility to begin the disposal of SNF to include temporary facilities, not just a permanent repository or other interim facilities. Article I(10), App. to Pet. 74a. The Standard Contract Delays Clause, Article IX, App. to Pet. 93a also referred only to temporary interruptions in schedules, not major programmatic failures to abide by the duties and deadlines of the NWPA. Thus, the Court of Appeals' reliance on the Standard Contract as overriding the NWPA is unsound as its interpretation conflicts with many of the provisions of the Standard Contract itself.

III. The Court Of Appeals' Refusal To Exercise Its Jurisdiction To Remedy The DOE's Refusal To Comply With Its Statutory Duty To Dispose Of High Level Radioactive Waste And Spent Nuclear Fuel, Violates The Duty Imposed Upon The Court Of Appeals To Act As The Sole Forum For Review

Of The DOE's Action Or Inaction Under NWPA § 119.

The Court of Appeals' May 5, 1998 and July 2, 1998 orders also unexpectedly incorporated major holdings that are contrary to the Court's duties under the applicable review statute, NWPA, § 119, 42 U.S.C. § 10139. In those orders, the Court of Appeals eliminated any meaningful future review in the Court of Appeals of a fundamentally important requirement of the NWPA, i.e., the unconditional obligation of the DOE to dispose SNF beginning not later than January 31, 1998.

As previously noted, the DOE's unconditional obligation was crucial not only to ensuring the credibility of the federal government's commitment to a nuclear waste disposal program but was also necessary to provide the fulcrum for the DOE's continued performance. The Court of Appeals' May 5 refusal to exercise its statutory jurisdiction to review and enforce this pivotal requirement of the NWPA trivializes both the Court's review function and the NWPA.

In addition to contradicting its own earlier stated view of DOE's duty to begin disposal as a statutory one, the Court's May 5 order also dissolves the core of its review jurisdiction and appellate duties by holding that:

> Breach by the DOE does not violate a statutory duty; thus, our jurisdiction to hear allegations of failure to take an action required under the NWPA, see 42 U.S.C. § 10139(a)(1)(B) does not provide a basis for a move-fuel order.[8]

---

[8] The Court ignored the fact that State Petitioners and Utility Petitioners, not just Yankee Atomic, requested further remedies, such as a move fuel order, because DOE has demonstrated the capability to perform, by its

App. to Pet. 20a. Thus, the Court of Appeals, in effect, has not only effectively repudiated its holding that DOE has an unconditional statutory obligation, but has also refused to ensure that DOE complies with that unconditional obligation.

The Court of Appeals' finding that the NWPA does not authorize enforcement of the DOE's duty is directly contrary to its review jurisdiction and duties under Section 119(a)(1) of the NWPA, which provides in pertinent part:

> Except for review in the Supreme Court of the United States, the United States courts of appeals shall have original and exclusive jurisdiction over any civil action –
>
> (A) for review of any final decision or action of the Secretary, the President, or the Commission under this part;
>
> (B) alleging the failure of the Secretary, the President, or the Commission to make any decision, or take any action, required under this part.

42 U.S.C. § 10139(a)(1)(A); 42 U.S.C. § 10139(a)(1)(B). App. to Pet. 66a. The May 5 and July 2 orders have foreclosed any review of DOE's failure to act in this regard. Relegating the parties to contractual remedies is wholly inconsistent with the Court of Appeals' original and

---

continuing acceptance of foreign and certain domestic SNF during most of this litigation; moreover, the State Petitioners had sought the appointment of a Special Master to monitor DOE's efforts or other remedies, all of which were readily capable of being undertaken by DOE with minimal judicial involvement, such as the filing by DOE of a plan describing how it would start to comply with the NWPA.

exclusive jurisdiction under Section 119(a)(1)(B) which was specifically designed to remedy the failure by the Secretary of Energy to undertake action required by the NWPA.

The Court of Appeals' order severely undercuts the purposes and provisions of the NWPA aimed at securing a definite and prompt resolution of the nation's nuclear waste disposal problems. NWPA §119(c), [42 U.S.C. § 10139(c)], which recognizes the NWPA's purposes for timely court review, inserts a 180 day period to appeal a DOE action or failure to act. It is difficult to see how the 180-day time for appeal has continued relevance when the Court by its May 5 and July 2 Orders have foreclosed review of a failure to act, and determined that actions for damages is an adequate substitute for requiring performance, or action, under the NWPA. Clearly, the January 31, 1998 deadline and purposes found in the NWPA can never be achieved by paying damages only. However, despite the Court of Appeals' original and exclusive jurisdiction under NWPA § 119(a)(1)(B), the May 5, 1998 order finds that the Court is powerless to remedy the failure by the DOE to undertake an unconditional obligation required by the NWPA. In short, the Court has taken an important statute, and Congress' goals and made them subservient to DOE's self-drafted Standard Contract.[9]

---

[9] The Court also ignores the fact that the Standard Contract itself inherently recognized Section 119 and other remedies by providing that any contract remedies were not exclusive. Art XI of the Standard Contract, App. to Pet. 88a states:

> Nothing in this contract shall be construed to preclude either party from asserting its rights and remedies under the contract or at law.

As the sole drafter of the Standard Contract, this language should be strictly construed against the drafter (i.e., the DOE).

Absent review by this Court, the Court of Appeals' refusal to remedy DOE's failure to act will engender a multiplicity of proceedings before DOE, before the U.S. Court of Federal Claims and appellate courts and lead to years of uncertainty and unnecessary confusion. Moreover, the NWPA's purpose of establishing a definite federal policy will be lost and additional years of inadequate federal efforts will be assured. Meanwhile, the strong public interest inherent in the timely disposal of high level nuclear waste will be frustrated indefinitely.

RELIEF SOUGHT

This Court should therefore exercise its jurisdiction to review the Court of Appeals' holding that the Nuclear Waste Policy Act does not impose on Department of Energy an enforceable unconditional statutory obligation to dispose of high level radioactive waste and spent nuclear fuel beginning not later than January 31, 1998, and the Court of Appeals' holding that it lacks jurisdiction to remedy the Department of Energy's failure to perform its unconditional statutory obligation.

Respectfully submitted,

FRANK J. KELLEY
Attorney General of Michigan

Thomas L. Casey
Solicitor General
Counsel of Record

David A. Voges
Henry J. Boynton
Assistant Attorneys General
760 G. Mennen Williams Building
P.O. Box 30212
Lansing, MI 48909
Telephone: (517) 373-1124

Dated: August 3, 1998

(Additional Counsel for Petitioners are Listed in the Appendix, beginning at App. Pet. 124a.)

APPENDIX

**Nuclear Reg. Rep. P 20,587, 45 ERC 1783,
28 Envtl. L. Rep. 20,231
(Cite as: 128 F.3d 754, 327 U.S.App.D.C. 20)**

NORTHERN STATES POWER COMPANY, et al.,
Petitioners,

v.

UNITED STATES DEPARTMENT OF ENERGY and
United States of America, Respondents,

IES Utilities, Inc., et al., Intervenors.

Nos. 97-1064, 97-1065, 97-1370 and 97-1398.

United States Court of Appeals,
District of Columbia Circuit.

Argued Sept. 25, 1997.

Decided Nov. 14, 1997.

* * *

On Petitions for Writs of Mandamus Directed to the United States Department of Energy.

Before: WILLIAMS, GINSBURG and SENTELLE, Circuit Judges.

Opinion for the Court filed by Circuit Judge SENTELLE.

SENTELLE, Circuit Judge:

In *Indiana Michigan* Power Co. v. Department of Energy, 88 F.3d 1272 (D.C.Cir.1996), we held that the Nuclear Waste Policy Act ("NWPA") imposes on the Department of Energy ("DOE") an unconditional obligation to begin disposing of high-level radioactive waste and spent nuclear fuel (collectively, "SNF") by January 31, 1998. After we issued our decision, DOE nonetheless informed various utilities and state commissions ("petitioners") that it would not accept the SNF for disposal by the 1998 deadline. Petitioners now seek a writ of mandamus requiring DOE to comply with Indiana Michigan and begin disposing of the SNF by the statutory deadline. We hold that the Standard Contract between DOE and the utilities provides a potentially adequate remedy if DOE fails to fulfill its obligations by the deadline, and thus do not grant in full the writ requested by petitioners. We do agree, however, that DOE's current approach toward contractual remedies is inconsistent with the NWPA and with our prior decision in Indiana Michigan. We thus grant the petition in part, and issue a writ of mandamus precluding DOE from advancing any construction of the Standard Contract that would excuse its delinquency on the ground that it has not yet established a permanent repository or an interim storage program.

I. Background

In the NWPA, Congress, confronting the "national problem" posed by the accumulation of spent nuclear fuel and radioactive waste produced by various domestic sources, 42 U.S.C. s 10131(a)(2), created a scheme whereby the federal government would have the responsibility to provide for the permanent disposal of the SNF, and the costs of such disposal would be borne by the owners and generators of the waste and spent fuel. 42 U.S.C. s 10131(a)(4). The plan provided that the owners and generators of the SNF would have the primary responsibility to provide and pay for its interim storage until the Secretary of Energy accepts the material "in accordance with the provisions of this chapter." 42 U.S.C. s 10131(a)(5).

As part of this regulatory program, Congress authorized the Secretary to enter into contracts with the owners and generators for the acceptance, transportation, and ultimate disposal of the SNF. 42 U.S.C. s 10222(a)(1). Congress left open many of the terms of the contracts, but specifically dictated, inter alia, the deadline by which DOE must begin disposing of the SNF. In the language of the statute, the "[c]ontracts entered into under this section shall provide that ... in return for the payment of fees established by this section, the Secretary, beginning not later than January 31, 1998, will dispose of the high-level radioactive waste or spent nuclear fuel involved as provided in this subchapter." 42 U.S.C. s 10222(a)(5)(B). "Payment of fees" referred to hefty contributions into a so-called Nuclear Waste Fund by owners and generators of the SNF.

In accordance with the NWPA, DOE adopted the final Standard Contract after notice and comment. The language of the Standard Contract is slightly different than that of the statute, but does include the requirement that disposal begin by January 31, 1998: "[t]he services to be provided by DOE

under this contract shall begin, after commencement of facility operations, not later than January 31, 1998 and shall continue until such time as all SNF and/or HLW [high-level radioactive waste] from the civilian nuclear power reactors ... has been disposed of." 10 C.F.R. s 961.11, Art. II (1996).

In 1993, various utilities and state agencies became concerned about DOE's ability to meet the 1998 deadline, and thus asked the Department to address how it would go about performing its responsibilities. The Department, apparently anticipating that it would not be ready to take the SNF by the deadline, took the position that it did not have a clear legal obligation to accept the SNF absent an operational repository or other facility. In its Final Interpretation of Nuclear Waste Acceptance Issues, issued in 1995, DOE announced that it "does not have an unconditional statutory or contractual obligation to accept high level waste and spent nuclear fuel beginning January 31, 1998 in the absence of a repository or interim storage facility constructed under the [NWPA]." 60 Fed.Reg. 21,793-94. The Department also took the position that "it lacks statutory authority under the Act to provide interim storage." 60 Fed.Reg. at 21,794.

The utilities and the states promptly filed petitions for review. The question before us in Indiana Michigan was whether the legal obligation of DOE to accept SNF by January 31, 1998, was conditioned on the presence of an operational repository or interim storage facility. Reviewing DOE's construction of the NWPA under the two-step analysis of Chevron U.S.A. Inc. v. Natural Resources Defense Council, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), we concluded that DOE's interpretation was contrary to the unambiguously expressed intent of Congress. We reached this conclusion after analyzing the plain language of the statute, which mandates that DOE assume a contractual obligation to start disposing of the SNF by January 31, 1998. We took special care to emphasize the

reciprocal nature of the obligations. DOE's duty to dispose of the SNF in a timely manner is "in return for" the payment of fees into the Nuclear Waste Fund. 42 U.S.C. s 10222(a)(5)(B). We held that DOE's obligation to meet the 1998 deadline is "without qualification or condition," and identified DOE's duty to "perform its part of the contractual bargain." 88 F.3d at 1273. We therefore remanded the matter to DOE for "further proceedings consistent with" our opinion. *Id.* at 1277. DOE neither sought rehearing of that decision nor petitioned the Supreme Court for further review.

After issuing our decision in Indiana Michigan, we would have expected that the Department would proceed as if it had just been told that it had an unconditional obligation to take the nuclear materials by the January 31, 1998, deadline. Not so. Quite to the contrary, the Department informed the utilities and the states that it would be unable to comply with the statutory deadline that this court had just reaffirmed. In late 1996, the utilities and the states initiated discussions with DOE and asked about the procedure and schedule that the Department would follow to comply with the court's decision. DOE responded to the utilities by announcing that it "will be unable to begin acceptance of spent nuclear fuel for disposal in a repository or interim storage facility by January 31, 1998." Utility Petitioners' Pet. at Tab 1; see also Tab 2. The Department recognized that the delay would affect "large number[s]" of contract holders, but nonetheless expressed "uncertainty as to when DOE will be able to begin spent fuel acceptance." Id. The letter ended by cordially inviting "the views of all contract holders on how the delay can best be accommodated." *Id.*

In a similar letter to the states, DOE wrote that it "understands that states are concerned about the Department's delay," and expressed an interest in talking with the states about how to mitigate the harm caused by the delay. State Petitioners' Pet., Att. D. DOE's letter also

revealed one of its asserted reasons for the delay: "The Administration continues to believe that interim storage siting should not proceed until the Department has the benefit of the information resulting from the Yucca Mountain Project Viability Assessment." *Id.* By the Department's own estimates, this Yucca Mountain facility will not be operational until the year 2010. Exhibits to Resp. Response, Tab 6, at 8.

On January 31, 1997, the utilities and state agencies separately petitioned for a writ of mandamus, seeking to compel DOE to comply with Indiana Michigan and begin disposal of the nuclear materials by January 31, 1998. Petitioners also requested that their payments to the Nuclear Waste Fund be placed in escrow unless and until DOE meets its obligations to dispose of SNF, and asked that the court prohibit DOE from taking any punitive action toward those who suspend payments to the Fund.

On June 3, 1997, DOE responded to comments submitted by contract holders regarding the anticipated delay. The Department began by recognizing that "Section 302 [of the NWPA] specifies that the contracts shall provide for the Department to begin to dispose of spent fuel not later than January 31, 1998." Exhibits to Resp. Response, Tab 6, at 4. DOE then expressed its belief that "the Standard Contract adopted by the Department pursuant to Section 302 and entered into by the contract holders specifies the available remedies in the event the Department is unable to meet the January 31, 1998 date." *Id.* Under Article IX of the contract, the Department asserted, the Department was "not obligated to provide a financial remedy for the delay," because the delay, in the Department's estimation, was "unavoidable." *Id.* at 2. After conceding that the delay may result in "hardship" to contract holders, DOE expressed its willingness "to consider amendments to individual contracts that would mitigate the impacts of the delay particular

contract holders will experience in the acceptance of their spent fuel." *Id.*

II. Discussion

[1] Petitioners assert that a writ of mandamus is necessary to force DOE to comply with Indiana Michigan and begin acceptance of the SNF by the 1998 deadline. Their argument rests on our prior conclusion that "section 302(a)(5)(B) [of the NWPA] creates an obligation in DOE, reciprocal to the utilities' obligation to pay, to start disposing of the SNF no later than January 31, 1998." 88 F.3d at 1277. DOE has not only failed to undertake "further proceedings consistent with" the court's opinion, petitioners argue, but has informed them of its plans to default on its obligations. Petitioners draw special attention to the fact that the Department currently accepts SNF from 41 foreign countries, from which they conclude that DOE is not unable but is simply unwilling to meet the 1998 deadline. They submit that a writ of mandamus is an appropriate remedy for the Department's refusal to comply with Indiana Michigan and perform its duties by the deadline set by Congress.[1]

[2-4] We start our consideration of the petition with the observation that "[t]he remedy of mandamus is a drastic one, to be invoked only in extraordinary situations." Allied Chemical Corp. v. Daiflon, Inc., 449 U.S. 33, 34, 101 S.Ct. 188, 190, 66 L.Ed.2d 193 (1980). Mandamus is proper only if "(1) the plaintiff has a clear right to relief; (2) the

---

[1] The state petitioners also contend that a writ of mandamus is warranted, wholly apart from our decision in Indiana Michigan, under Telecommunications Research & Action Center v. F.C.C., 750 F.2d 7 (D.C.Cir.1984) ("TRAC"). State Petitioners' Pet. at 9-12. Because we issue a writ of mandamus to effectuate our decision in Indiana Michigan, we decline to reach the additional question of whether issuance of the writ would have been proper under TRAC.

defendant has a clear duty to act; and (3) there is no other adequate remedy available to plaintiff." Council of and for the Blind of Delaware County Valley v. Regan, 709 F.2d 1521, 1533 (D.C.Cir.1983) (en banc). The party seeking mandamus has the burden of showing that "its right to issuance of the writ is clear and indisputable." Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 289, 108 S. Ct. 1133, 1143, 99 L.Ed.2d 296 (1988) (internal quotations and citations omitted).

Petitioners have established that they have a clear right to relief, and thus have satisfied the first requirement for a writ of mandamus. As we explained in Indiana Michigan, the NWPA requires DOE, "in return for the payment of fees," to begin disposing of the materials "not later than January 31, 1998." 42 U.S.C. s 10222(a)(5)(B). We specifically noted that the payment of fees into the Nuclear Waste Fund is the "only limitation placed on the Secretary's duties" found in the text of the statute. 88 F.3d at 1276. The owners and generators have dutifully complied with the NWPA, pouring billions of dollars of payments into the Fund with the expectation that DOE would live up to its end of the bargain. The Department, on the other hand, has tersely informed the parties that it "will be unable to begin acceptance of spent nuclear fuel for disposal in a repository or interim storage facility by January 31, 1998." Utility Petitioners' Pet. at Tab 1. Petitioners' full compliance with the requirements of the NWPA, taken in conjunction with DOE's refusal to perform its reciprocal duties, compels the conclusion that petitioners have established a clear right to relief in this case.

The second requirement is also satisfied. DOE's duty to act could hardly be more clear. DOE argued in Indiana Michigan that its obligations under the NWPA were contingent on the existence of a repository or interim storage facility. We held that DOE's interpretation was inconsistent with the text of the NWPA, which clearly demonstrates a

congressional intent that the Department assume a contractual obligation to perform by the 1998 deadline, "without qualification or condition." 88 F.3d at 1276. DOE's duty to take the materials by the 1998 deadline is also an integral part of the Standard Contract, which provides that the Department "shall begin" disposing of the SNF by January 31, 1998. 10 C.F.R. s 961.11, Art. II. The contractual obligations created consistently with the statutory contemplation leave no room for DOE to argue that it does not have a clear duty to take the SNF from the owners and generators by the deadline imposed by Congress.

Although petitioners have a clear right to relief, and the Department has a clear duty to act, we decline to issue the broad writ of mandamus sought by petitioners because they are presented with another potentially adequate remedy. Although the statute does not prescribe a particular remedy in the event that the Department fails to perform on time, the Standard Contract does provide a scheme for dealing with delayed performance. 10 C.F.R. s 961.11, Art. IX. Specifically, Article IX of the Standard Contract outlines how the parties are to proceed if one party is unable to fulfill its obligations in a timely manner. Under Article IX, unavoidable delays are to be treated differently than avoidable delays. A failure to perform is considered "unavoidable" only if such failure "arises out of causes beyond the control and without the fault or negligence of the party failing to perform." *Id.* at Art. IX.A. If a party's delay is determined to be unavoidable, that party is not liable for damages caused by the failure to perform in a timely manner. *Id.* An avoidable delay, in contrast, is caused by "circumstances within the reasonable control" of the delinquent party. *Id.* at Art. IX. B. If a party's delay is avoidable, the charges and schedules in the contract must be equitably adjusted to reflect additional costs incurred by the other party. *Id.* The contract also provides a mechanism for resolving disputes of fact that the parties may encounter

along the way. See *id.* at Art. XVI.

Petitioners have not convinced us that this contractual scheme is inadequate to deal with DOE's anticipated delay in accepting the SNF. Petitioners have suggested that the contractual processes are inadequate, claiming that they will "suffer additional billions of dollars in additional costs if DOE fails to meet its January 1998 obligation," Utility Petitioners' Pet. at 4, and that they will not be able to recover these costs in the contract proceedings because the Department is excusing its own default. See Utility Petitioners' Reply at 2. Such costs may in fact ensue if DOE fails to perform on time, but there is no reason to believe that these additional expenses will not be taken into account if the contractual processes operate as Congress intended. *See infra* at 11-13. Accordingly, we conclude that petitioners must pursue the remedies provided in the Standard Contract in the event that DOE does not perform its duty to dispose of the SNF by January 31, 1998. This conclusion, we should note, comports with our decision in *Indiana Michigan*. Even though we did not enter a remedy at that time, we suggested that the provisions of the Standard Contract would determine the appropriate remedy for the Department's failure to perform its obligations. 88 F.3d at 1277.

A writ of mandamus is required, however, to compel DOE to comply with our prior mandate in *Indiana Michigan*. See Office of Consumers' Counsel v. FERC, 826 F.2d 1136, 1140 ("A federal appellate court has the authority, through the process of mandamus, to correct any misconception of its mandate by a lower court or administrative agency subject to its authority."); see also Potomac Electric Power Co. v. Interstate Commerce Comm., 702 F.2d 1026, 1032 (D.C.Cir.1983). We held in *Indiana Michigan* that the NWPA imposes an unconditional obligation, memorialized in the Standard Contract, to begin disposing of the materials by January 31, 1998. We rejected the Department's attempt

to water-down its obligations, finding that DOE's interpretation would "destroy[ ] the quid pro quo created by Congress" and would mean that the payment of fees into the Nuclear Waste Fund "was for nothing." 88 F.3d at 1276. To effectuate DOE's duty, as we recognized in *Indiana Michigan*, petitioners must be able to enforce the terms of the contract in a meaningful way. Petitioners' ability to enforce the contract would be frustrated if DOE were allowed to operate under a construction of the contract inconsistent with our prior conclusion that the NWPA imposes an obligation on DOE "without qualification or condition." *Id.*

Viewed in this light, DOE's current approach toward contractual remedies violates our directives in *Indiana Michigan*. As explained above, the Department has endeavored to proceed according to Article IX of the Standard Contract, by first informing the parties of its anticipated delay, and then evaluating whether its own delay is "unavoidable." Article IX describes an unavoidable delay as a party's " failure to perform its obligations ... aris[ing] out of causes beyond the control and without the fault or negligence of the party failing to perform." 10 C.F.R. s 961.11, Art. IX.A. The contract goes on to list a few examples of circumstances "beyond the reasonable control" of the delayed party: "acts of God, or of the public enemy, acts of Government in either its sovereign or contractual capacity, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes and unusually severe weather." *Id.* The Contracting Officer isolated six factors that, taken together, supposedly support the conclusion that DOE experienced an unavoidable delay in this case: technical problems; regulatory delays; roadblocks to implementation of interim or monitored retrievable storage; funding restrictions; litigation delays; and consultation requirements. Exhibits to Resp. Response, Tab 6. Reaching the preliminary conclusion that the delay was unavoidable,

the Department's Contracting Officer let DOE off the hook for monetary damages.

The most glaring problem with DOE's position is that it is answering the wrong question: it is attempting to explain why it will not have a "state-of- the-art, deep geologic facility for the permanent disposal of the Nation's spent nuclear fuel and high-level waste" ready by 1998. *Id.* Put another way, DOE's position is that its delayed performance is unavoidable because it does not have an operational repository, and does not have the authority to provide storage in the interim. DOE is simply recycling the arguments rejected by this court in *Indiana Michigan*. DOE unsuccessfully argued in that case that it does not have an obligation to take the SNF in the absence of an operational repository or other facility; here, DOE recycles that same argument in the slightly different form that it does not have responsibility for the costs resulting from its failure to perform that duty because it does not have an operational repository or other facility. As we pointed out in *Indiana Michigan*, the NWPA directs DOE to undertake the duty to begin taking the SNF by January 31, 1998, whether or not it has a repository or interim storage facility. DOE cannot now render its obligation contingent, and free itself of the costs caused by its delay, by advancing the same failed position that we rejected before.

Given DOE's repeated attempts to excuse its delay on the ground that it lacks an operational repository or interim storage facility, we find it appropriate to issue a writ of mandamus to correct the Department's misapprehension of our prior ruling. Accordingly, we order DOE to proceed with contractual remedies in a manner consistent with NWPA's command that it undertake an unconditional obligation to begin disposal of the SNF by January 31, 1998. More specifically, we preclude DOE from concluding that its delay is unavoidable on the ground that it has not yet

prepared a permanent repository or that it has no authority to provide storage in the interim.

This necessarily means, of course, that DOE not implement any interpretation of the Standard Contract that excuses its failure to perform on the grounds of "acts of Government in either its sovereign or contractual capacity." 10 C.F.R. s 961.11, Art. IX.A. We held in *Indiana Michigan* that the NWPA imposes an unconditional duty on DOE to take the materials by 1998. Congress, in other words, directed DOE to assume an unqualified obligation to take the materials by the statutory deadline. Under the Department's interpretation of the governing contractual provisions, however, the government can always absolve itself from bearing the costs of its delay if the delay is caused by the government's own acts. This cannot be a valid interpretation, as it would allow the Executive Branch to void an unequivocal obligation imposed by Congress. DOE has no authority to adopt a contract that violates the directives of Congress, just as it cannot implement interpretations of the contract that contravene this court's prior ruling. We hold that this provision in the Standard Contract, insofar as it is applied to DOE's failure to perform by 1998, is inconsistent with DOE's statutory obligation to assume an unconditional duty.

III. Conclusion

In conclusion, we do not grant petitioners' broad request for a writ of mandamus because we conclude that the remedial scheme of the Standard Contract offers a potentially adequate remedy. We do, however, grant the petition in part because DOE has not abided by our prior conclusion that the NWPA imposes an unconditional obligation on the Department to begin disposal of the SNF by January 31, 1998. We therefore issue a writ of mandamus precluding DOE from excusing its own delay on the grounds that it has

not yet prepared a permanent repository or interim storage facility. We retain jurisdiction over this case pending compliance with the mandate issued herewith.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 97-1064 September Term, 1997

Northern States Power Company, (Minnesota), et al.,
Petitioners

v.

Department of Energy and United States of America,
Respondents

IES Utilities, Inc., et al., Intervenors

Consolidated with Nos. 97-1065, 97-1370 and 97-1398

BEFORE: Edwards, Chief Judge, Wald, Silberman, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, Tatel and Garland, Circuit Judges

ORDER

Upon consideration of respondents' Suggestion for Rehearing In Banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the suggestion be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY:

Robert A. Bonner
Deputy Clerk

Circuit Judges Silberman and Garland did not participate in this matter.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 97-1064 September Term, 1997

Northern States Power Company, et al., Petitioners

v.

United States Department of Energy and
United States of America, Respondents

IES Utilities, Inc., et al., Intervenors

Consolidated with Nos. 97-1065, 97-1370 and 97-1398

No. 98-1069
In Re:
Maine Yankee Atomic Power Co., Petitioner

No. 98-1070
In Re:
Southern Nuclear Operating Co., et al., Petitioners

Before WILLIAMS, GINSBURG and SENTELLE, *Circuit Judges*.

ORDER

Upon consideration of the Motions to Consolidate from Maine Yankee and Southern Nuclear; the Motions from the Department of Energy to Dismiss the suits of Maine Yankee and Southern Nuclear; the Motions for Enforcement of the Mandate from the State Petitioners, the Utility Petitioners, and Connecticut Yankee; and the Petitions for Rehearing from Yankee Atomic and the Department of Energy, and the responses thereto and the replies, it is hereby

ORDERED that the Motions to Consolidate are granted. The Petitions and Motions are otherwise denied.

I. Maine Yankee and Southern Nuclear Operating Company are parties to the Department of Energy's ("DOE") Standard Contract for Disposal of Spent Nuclear Fuel ("SNF"). Their suits against the DOE present issues identical to those raised by the Utility Petitioners in Northern States Power Co. v. DOE, 128 F.3d 754 (D.C. Cir. 1997). To make clear that they are entitled to identical relief, we grant the motion to consolidate. Our disposition of the motions for enforcement and petitions for rehearing, discussed below, applies in full measure to Maine Yankee and Southern Nuclear.

II. The DOE moves for dismissal of the actions of Maine Yankee and Southern Nuclear. Those utilities are entitled to the same relief as the other Utility Petitioners; consequently, we do not dismiss their suits but instead consolidate them with Northern States. The relief awarded in that decision extends to them. To the extent that they join in the Utility Petitioners' motions, the following dispositions also apply to them. The DOE's motion is denied.

III. The State Petitioners request an order that (1)-bars the DOE from using utility and ratepayer-supplied monies from the Nuclear Waste Fund ("NWF") or fee collections to pay any costs or damages awarded to utilities under the Standard Contract; (2)authorizes the payment of NWF fees into an interest-bearing escrow account; and (3)-requires the DOE to file a plan for disposing of SNF before receiving any more shipments of foreign or domestic SNF at its existing facilities.

We express no opinion on the legality of the DOE's using utility or ratepayer-supplied monies to pay costs or damages, nor on the adequacy of any particular type of equitable adjustment of fees that might be awarded to utilities under the Delays Clause of the Standard Contract. Our decision in Northern States barred the DOE from interpreting the Contract as imposing only a contingent disposal obligation; such an interpretation, we ruled, would place the DOE in violation of its statutory duties under the Nuclear Waste Policy Act ("NWPA"), which required it to undertake an unconditional obligation. Beyond that clarification of the statute's requirements, we remitted the utilities to their remedies under the Standard Contract. Suits based on the Contract may present issues of the permissible forms of equitable adjustment, and possibly the award of some forms equitable adjustment would place the DOE in violation of the NWPA and again properly trigger our jurisdiction (as opposed to that of the Court of Federal Claims) under either the NWPA or the APA. But as the DOE has not yet taken any of these actions, the issues are not ripe for review as presented to us in these petitions.

The second and third elements of the State Petitioners' requested order constitute equitable contract remedies against the DOE and fall outside the scope of the Northern States mandate. Northern States describes the nature of the DOE's obligation, which was created by the

NWPA and undertaken by the DOE under the Standard Contract. It does not place the question of contract remedies in this court, nor set up this court as a source of remedies outside the Standard Contract.

IV. The Utility Petitioners request essentially the same relief as the State Petitioners. For the same reasons, their request is denied.

V. Yankee Atomic requests an order requiring the DOE to begin to dispose of its SNF, asserting that monetary damages are inadequate. We do not address the question of the adequacy of damages or of any contract remedy. The order cannot issue because enforcement of our mandate does not extend to requiring the DOE to perform under the Standard Contract. While the statute requires the DOE to include an unconditional obligation in the Standard Contract, it does not itself require performance. Breach by the DOE does not violate a statutory duty; thus, our jurisdiction to hear allegations of failure to take an action required under the NWPA, see 42 U.S.C. §10139(a)(1)(B), does not provide a basis for a move-fuel order.

VI. Connecticut Yankee requests an order prohibiting the DOE from using NWF monies to compensate utilities for delay, and requiring the DOE to move Connecticut Yankee's spent fuel. This request is covered by the discussion above: the issue of recycling NWF monies is not ripe, and the move-fuel order is beyond our mandate.

VII. The DOE petitions for rehearing, suggesting that this Court has erroneously designated itself as the proper forum for adjudication of disputes arising under the Standard Contract. As the above should make clear, we did not; we merely prohibited the DOE from implementing an interpretation that would place it in violation of

its duty under the NWPA to assume an unconditional obligation to begin disposal by January 31, 1998. The statutory duty to include an unconditional obligation in the contract is independent of any rights under the contract. The Tucker Act does not prevent us from exercising jurisdiction over an action to enforce compliance with the NWPA. The DOE's petition is denied.

FOR THE COURT:

Mark J. Langer, Clerk

BY:

Michael C. McGrail
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 97-1064 September Term, 1997

Northern States Power Company, (Minnesota), et al.,
Petitioners

v.

Department of Energy and United States of America,
Respondents

IES Utilities, Inc., et al., Intervenors

Consolidated with Nos. 97-1065, 97-1370 and 97-1398,
98-1069, 98-1070

98-1201

Southern California Edison Company, Petitioner

v.

Department of Energy, Respondent

98-1213

Washington Public Power Supply System and South Carolina Electric & Gas Company, Petitioners,

v.

Department of Energy, Respondent

BEFORE: WILLIAMS, GINSBURG, and SENTELLE, *Circuit Judges*

ORDER

Upon consideration of the petitions for review and for a writ of mandamus the motion to consolidate, the motion to dismiss, the joint motion to withdraw, and the stipulation regarding the response to the petition for review in 98-1213, it is

ORDERED that the motions to consolidate be granted. It is

FURTHER ORDERED that the petitions be denied. Because the holding of Northern States v. Department of Energy, 128 F.3d 754 (D.C. Cir. 1997), bars the Department of Energy from utilizing its previous interpretation of the Nuclear Waste Policy Act in dealings with any entity, and because Standard Contract holders must seek remedies available under the contract in other fora, these cases and No. 97-1067 are concluded and no further relief can be sought therein. See Northern States v. Department of Energy, No. 97-1064 (D.C. Cir. May 5, 1998) (order explaining reasons for refusal to grant relief on post-judgment petitions for review and for mandamus).

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. See D.C. Cir. Rule 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY:

Michael C. McGrail
Deputy Clerk/LD

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 97-1064 September Term, 1997

Northern States Power Company, (Minnesota), et al.,
Petitioners

v.

Department of Energy and United States of America,
Respondents

IES Utilities, Inc., et al., Intervenors

Consolidated with Nos. 97-1065, 97-1370 and 97-1398,
98-1069, 98-1070

98-1284

Dairyland Power Cooperative, Petitioner

v.

Department of Energy and United States of America,
Respondents

BEFORE: WILLIAMS, GINSBURG, and SENTELLE,
Circuit Judges

ORDER

Upon consideration of the petition for review and the motion for consolidation with No. 97-1064, it is

ORDERED that the petition be denied, for the reasons stated in the court's order filed May 5, 1998, in Northern States v. Department of Energy, No. 97-1064. It is

FURTHER ORDERED that the motion to consolidate be dismissed as moot.

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. See D.C. Cir. Rule 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY:

Michael C. McGrail
Deputy Clerk/LD

Nuclear Reg. Rep. P 20,578, 65 USLW 2092, 43 ERC 1033, 170 P.U.R.4th 564, 26 Envtl. L. Rep. 21,406

(Cite as: 88 F.3d 1272, 319 U.S.App.D.C. 209)

INDIANA MICHIGAN POWER COMPANY, et al., Petitioners,

v.

DEPARTMENT OF ENERGY and United States of America, Respondents,

Northern States Power Company (Minnesota), et al., Intervenors.

Nos. 95-1279, 95-1321 and 95-1463.

United States Court of Appeals, District of Columbia Circuit.

Argued Jan. 17, 1996.

Decided July 23, 1996.

On Petitions for Review of an Order of the Department of Energy.

Before: WILLIAMS, GINSBURG and SENTELLE, Circuit Judges.

Opinion for the Court filed by Circuit Judge SENTELLE.

SENTELLE, Circuit Judge:

The Nuclear Waste Policy Act ("NWPA") of 1982 authorized the Secretary of Energy ("Secretary") to enter contracts with owners and generators of high- level radioactive waste and spent nuclear fuel ("SNF") under which the private parties were to pay the Secretary statutorily imposed fees in return for which the Secretary, "beginning not later than January 31, 1998, will dispose of the high-level radioactive waste or [SNF] involved...." 42 U.S.C. s 10222(a)(5)(B) (1994). Petitioners are utilities and state commissions who paid fees to the Secretary under the statute. They seek review of the Department of Energy's ("DOE") final interpretation declaring that the Department has no obligation to perform its part of the contractual bargain. We conclude that the Department's interpretation is not valid and we therefore allow the petition for review.

Background

In the NWPA, Congress created a comprehensive scheme for the interim storage and permanent disposal of high-level radioactive waste generated by civilian nuclear power plants. NWPA establishes that, in return for a payment of fees by the utilities, DOE will construct repositories for SNF, with the utilities generating the waste bearing the primary

responsibility for interim storage of SNF until DOE accepts the SNF "in accordance with the provisions of this chapter." 42 U.S.C. s 10131(a)(5).

The NWPA requires the utilities to enter into standard contracts with DOE for the disposal of the waste. According to the statute, the contracts shall provide that:

> (A) following commencement of operation of a repository, the Secretary shall take title to the high-level radioactive waste or spent nuclear fuel as expeditiously as practicable upon the request of the generator or owner of such waste or spent fuel; and
>
> (B) in return for the payment of fees established by this section, the Secretary, beginning not later than January 31, 1998, will dispose of the high-level radioactive waste or spent nuclear fuel as provided in this subchapter.

42 U.S.C. s 10222(a)(5). The final standard contract adopted by DOE, following notice and comment, states that "[t]he services to be provided by DOE under this contract shall begin, after commencement of facility operations, not later than January 31, 1998 and shall continue until such time as all SNF ...from the civilian nuclear power reactors specified ... has been disposed of." 10 C.F.R. s 961.11, Art. II (1996).

In 1993, several states and utilities became concerned about DOE's ability to meet its obligations under the NWPA. Therefore, they requested DOE to address its responsibilities under the NWPA, particularly section 302(a)(5), 42 U.S.C. s 10222(a)(5), and the January 31, 1998 deadline. Daniel Dreyfuss, Director of DOE's Office of Civilian Radioactive Waste Management, responded in a letter that DOE "does not have a clear legal obligation under the [NWPA] to accept [SNF] absent an operational repository or other facility." In February 1994, DOE's Secretary, Hazel O'Leary, indicated

that, while at the time NWPA was enacted DOE "envisioned that it would have a waste management facility in operation and prepared to begin acceptance of [SNF] in 1998," DOE subsequently concluded it did not have "a clear legal obligation under the [NWPA] to accept [SNF] absent an operational repository or other facility constructed under the [NWPA]."

To address this issue, on May 25, 1994, DOE published a Notice of Inquiry on Waste Acceptance Issues ("NOI"), requesting the views of affected parties on matters relating to the continued storage of SNF at reactor sites beyond 1998. 59 Fed.Reg. 27,007 (1994). DOE presented its preliminary finding that it had "no statutory obligation to accept [SNF] beginning in 1998 in the absence of an operational repository or other facility constructed under the [NWPA]." Id. at 27,008. DOE did note, however, that the terms of the Standard Contract may have created such an expectation. *Id.*

On June 20, 1994, utility petitioners ("utilities") and state petitioners ("states") filed petitions for review against DOE. This Court dismissed the petitions, finding that the NOI did not constitute final agency action. Northern States Power Co. v. DOE, Nos. 94-1457, 94-1458, 94-1574, 1995 WL 479714 (D.C.Cir. July 28, 1995) (order granting motion to dismiss case).

On April 28, 1995, DOE issued its Final Interpretation. Final Interpretation of Nuclear Waste Acceptance Issues, 60 Fed.Reg. 21,793 (1995). In the Final Interpretation, DOE stated that it would not be able to begin taking SNF by January 31, 1998, the date established by the NWPA. *Id.* at 21,793-94. DOE concluded that it did not have an unconditional statutory or contractual obligation to accept high-level waste and spent fuel beginning January 31, 1998 in the absence of a repository or interim storage facility constructed under the NWPA. *Id.* The agency also

determined that it had no authority under the NWPA to provide interim storage in the absence of a facility that has been authorized, constructed and licensed in accordance with the NWPA. *Id.* at 21,797. Finally, DOE declared that, even if it did have an unconditional obligation under the statute, the Delays Clause of the Standard Contract would provide an administrative remedy for DOE's failure to satisfy an obligation under the statute. *Id.*

Petitioners and intervenors then filed their petitions for review of the Final Interpretation.

Analysis

[1, 2] In reviewing an agency's construction of a statute entrusted to its administration, we follow the two-step statutory analysis established in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). First, we ask whether Congress has spoken unambiguously to the question at hand. If it has, then our duty is clear: "We must follow that language and give it effect." *Wisconsin Elec. Power Co. v. DOE*, 778 F.2d 1, 4 (D.C.Cir.1985). If not, we consider the agency's action under the second step of Chevron, deferring to the agency's interpretation if it is "reasonable and consistent with the statute's purpose." *Nuclear Info. Resource Serv. v. NRC*, 969 F.2d 1169, 1173 (D.C.Cir.1992) (quoting *Chemical Mfrs. Ass'n v. EPA*, 919 F.2d 158, 162- 63 (D.C.Cir.1990)). We now apply that review to the Department's interpretation of section 302(a)(5)(B).

Section 302(a)(5)(B) states that "in return for the payment of fees ... [DOE], beginning not later than January 31, 1998, will dispose of the [SNF]...." The states and utilities contend that this provision means what it says: in return for the payment of fees to the utilities, DOE will begin accepting

SNF not later than January 31, 1998. DOE argues that this language does not in fact require it to begin to dispose of SNF by January 31, 1998; rather, the agency contends that this obligation is further conditioned on the availability of a repository or other facility authorized, constructed, and licensed in accordance with the NWPA. DOE contends that this is the only interpretation possible when one examines the statute as a whole.

To support this interpretation, the Department first argues that Congress's use of the term "dispose" in section 302(a)(5)(B), which provides that DOE "will dispose of the high-level radioactive waste or spent nuclear fuel involved as provided in this subchapter," presupposes the availability of a repository. Although conceding that the statute does not define "dispose," DOE notes that the statute does define "disposal" as "the emplacement in a repository of ... spent nuclear fuel ... with no foreseeable intent of recovery." 42 U.S.C. s 10101(9). DOE contends that "dispose" is simply a different grammatical form of "disposal," and that Congress must have intended the two terms be interpreted consistently. Thus, it argues, section 302 must require a repository be operational before DOE may begin accepting SNF.

We disagree. The phrase "dispose of " is a common term. It has a common meaning. For example, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY UNABRIDGED 654 (1961) defines it as meaning, among other things, "to get rid of; throw away; discard." Admittedly, that and other dictionaries list other definitions. Each of those definitions, however, is consistent with the one set forth and not consistent with a limitation for placing the object of the phrase "in the disposal." There is no indication in the statute that Congress intended the words to be used in any but their common sense. See *McNally v. United States*, 483 U.S. 350, 358-59, 107 S.Ct. 2875, 2880-81, 97 L.Ed.2d 292 (1987) (interpreting commonly used phrase according to

"common understanding" where Congress had "not indicat[ed]" an intent to depart from it). Indeed, the very fact that Congress defined "disposal" restrictively and did not define "dispose" bears mute testimony to the strong possibility that Congress intended the former as a term of art, the latter as common English. Indeed, DOE itself has previously concluded that the statutory definition of "disposal" was not intended to define "dispose of." In an April 1, 1987 letter, DOE's general counsel, although responding to a different issue, wrote "we doubt that the[se] terms were intended to have identical meanings." Furthermore, if DOE's obligation to dispose of waste was linked exclusively to the Act's definition of "disposal" then that obligation would be conditioned only upon the availability of a repository. However, Article II of the Standard Contract provides that DOE will provide its services after commencement of "facility" operations, 10 C.F.R. 961.11, with "facility" being defined as including both a repository and "such other facilit[ies] to which spent nuclear fuel and/or high-level radioactive waste may be shipped by DOE prior to its transportation to a disposal facility." *Id.* at Article I. It is difficult to see how that paragraph and the Department's interpretation of the statutory section can sensibly coexist.

Perhaps more importantly, we must interpret the section in light of the whole statutory scheme. See *Bailey v. United States*, --- U.S. ----, ----, 116 S.Ct. 501, 506, 133 L.Ed.2d 472 (1995) (observing that a court must "consider not only the bare meaning of the word but also its placement and purpose in the statutory scheme.") In the scheme before us, indeed in another subsection of the very section under review, Congress used even the elsewhere narrowly defined "disposal" to encompass more than "emplacement in a repository of ... spent nuclear fuel ... with no foreseeable intent of recovery." That is, in section 302(d), 42 U.S.C. s 10222(d), Congress authorizes the Secretary to make

expenditures "for purposes of radioactive waste disposal activities," and expressly includes within the ambit of authorized "disposal" activities those conducted not only in connection with repositories, but also with "any ... monitored retrievable storage facility or test and evaluation facility constructed under this chapter." 42 U.S.C. s 10222(d)(1). Therefore, even if we look to Congress's use of "disposal" to enlighten our interpretation of "dispose of," we still find that Congress has not evidenced limited usage for which the Department argues.

DOE next argues that subsections (A) and (B) of 302(a)(5) are not independent provisions, but rather must be read together because taking title to the waste cannot be separated from the disposal activities. To support this proposition, DOE cites section 302(a)(1), which describes the Standard Contract as "for the acceptance of title, subsequent transportation, and disposal of such waste or spent fuel" and section 123, which provides that "[d]elivery and acceptance by the Secretary, of any high-level radioactive waste or spent nuclear fuel for a repository constructed under this part shall constitute a transfer to the Secretary of title to such waste and spent fuel." 42 U.S.C. s 10143. Respondent contends that these provisions evince Congress's intent that DOE take title to the waste before proceeding with disposal. According to DOE, any other interpretation of these sections would result in an anomaly in which one party would have ownership of the SNF while another party would have physical control of it.

We do not find this argument persuasive. Sections 302(a)(5)(A) and (B) clearly set forth two independent requirements. These separate obligations are independent of whether DOE holds title to SNF when it begins to dispose of the material. The duties imposed on DOE under subsections (A) and (B) are linked to different events and are triggered at different times. DOE's duty under subsection (A) to take

title to the SNF is linked to the commencement of repository operations and is triggered when a generator or owner of SNF makes a request to DOE. DOE's duty under subsection (B) to dispose of the SNF is conditioned on the payment of fees by the owner and is triggered, at the latest, by the arrival of January 31, 1998. Nowhere, however, does the statute indicate that the obligation established in subsection (B) is somehow tied to the commencement of repository operations referred to in subsection (A).

This conclusion is reinforced by the placement of the two requirements in the Standard Contract. DOE's obligation to dispose of SNF under section 302(a)(5)(B) is set forth in Article II-Scope, 10 C.F.R. s 961.11, whereas DOE's obligation to take title to SNF under section 302(a)(5)(A) is set forth in Article VII-Title. *Id.* In addition, contrary to DOE's assertions, it is not illogical for DOE to begin to dispose of SNF by the 1998 deadline and yet not take title to the SNF until a later date. As the utilities point out, it is not unusual, particularly in the nuclear area, to recognize a division between ownership of materials and other obligations relating to such materials. For example, the Nuclear Regulatory Commission recognizes a distinction between the ownership of nuclear materials and the right to possess or use such materials. See also 10 C.F.R. s 70.20; 10 C.F.R. s 40.21.

In fact, a comparison of paragraphs (A) and (B) argues against the Department's position. In (A), Congress expressly conditioned the obligation of the Secretary on the commencement of the operation of a repository. In (B), Congress imposed no such condition, but rather directed the beginning of the Secretary's duty as "not later than January 31, 1998," without qualification or condition. The only limitation placed on the Secretary's duties under (B) is that that duty is "in return for the payment of fees established by this section." The Department's treatment of this statute is

not an interpretation but a rewrite. It not only blue-pencils out the phrase "not later than January 31, 1998," but destroys the *quid pro quo* created by Congress. It does not survive the first step of the *Chevron* analysis. 467 U.S. at 842-43, 104 S.Ct. at 2781-82. Under the plain language of the statute, the utilities anticipated paying fees "in return for [which] the Secretary" had a commensurate duty. She was to begin disposing of the high-level radioactive waste or SNF by a day certain. The Secretary now contends that the payment of fees was for nothing. At oral argument, one of the panel compared the government's position to a Yiddish saying: "Here is air; give me money," and asked counsel for the Department to distinguish the Secretary's position. He found no way to do so, nor have we.

Finally, respondent asserts that reading subsection (B) as creating an unconditional obligation cannot be reconciled with other requirements of the statute, noting that the NWPA provides a complex scheme for the authorization, construction and licensing of a repository or monitored retrieval storage facility. DOE contends that "many contingencies facing the commencement of repository operations strongly undercut the assumption that Congress intended to require disposal by 1998 no matter what the outcome."

Although Congress anticipated the existence of a repository by 1998, the fact that such a repository does not exist does not make subsection (B) illogical; it simply affects the remedy we can provide. We agree with DOE that Congress contemplated a facility would be available by 1998; however, that Congress contemplated such a facility would be available does not mean that Congress conditioned DOE's obligation to begin acceptance of SNF on the availability of a facility. It does not make sense to assert that Congress would express an intent to exempt DOE from the January 31, 1998 deadline by including specific statutory

procedures regarding the siting and development of a repository in the NWPA. Rather, these prerequisites evince a strong congressional intent that DOE's various obligations be performed in a timely manner. See, e.g., *Tennessee v. Herrington*, 806 F.2d 642, 648 (6th Cir.1986) ("[T]he overall structure of the Act does reveal a consistent concern for timely implementation of the disposal provisions."), cert. denied, 480 U.S. 946, 107 S.Ct. 1604, 94 L.Ed.2d 790 (1987). DOE's interpretation of the provisions does not harmonize them. Instead, its interpretation reads into section 302(a)(5)(B) language that appears only in section 302(a)(5)(A) and reads out of section 302(a)(5)(B) language that actually appears in that provision.

It is premature to determine the appropriate remedy, particularly as to the interaction between Article XI and Article XVI of the Standard Contracts, as DOE has not yet defaulted upon either its statutory or contractual obligation. We therefore will remand this matter for further proceedings consistent with this opinion.

Conclusion

In conclusion, we hold that the petitioners' reading of the statute comports with the plain language of the measure. In contrast, the agency's interpretation renders the phrase "not later than January 31, 1998" superfluous. Thus, we hold that section 302(a)(5)(B) creates an obligation in DOE, reciprocal to the utilities' obligation to pay, to start disposing of the SNF no later than January 31, 1998. The decision of the Secretary is vacated, and the case is remanded for further proceedings consistent with this opinion.

DEPARTMENT OF ENERGY

Office of Civilian Radioactive Waste Management; Nuclear Waste Acceptance Issues

AGENCY: Office of Civilian Radioactive Waste Management, Department of Energy.

ACTION: Department of Energy final interpretation of nuclear waste acceptance issues.

SUMMARY: This Notice responds to public comments on the Department of Energy (DOE) Notice of Inquiry on Waste Acceptance Issues published on May 25, 1994 (59 FR 27007). After analyzing public comments received in response to the Notice, DOE has concluded that it does not have an unconditional statutory or contractual obligation to accept high level waste and spent nuclear fuel beginning [[Page 21794]] January 31, 1998 in the absence of a repository or interim storage facility constructed under the Nuclear Waste Policy Act of 1982, as amended. In addition, DOE has concluded that it lacks statutory authority under the Act to provide interim storage.

FOR FURTHER INFORMATION CONTACT: Mr. Robert Waxman of the Department of Energy Office of General Counsel at (202) 586-6975.

SUPPLEMENTARY INFORMATION:

I. Background

The Nuclear Waste Policy Act of 1982, as amended (Act or NWPA), 42 U.S.C. 10101 et seq., provides a

comprehensive framework for disposing of high level radioactive waste and spent nuclear fuel (SNF) generated by civilian nuclear power reactors. In general, the Act sets forth procedures for selecting a repository site and developing a repository for disposal of high-level radioactive waste and SNF and for financing the cost of such disposal. Section 302(a) of the Act authorizes the Secretary to enter into contracts with the owners and generators of SNF of domestic origin (utilities) for the acceptance and disposal of SNF,<SUP>1 and stipulates that the contracts provide that the Secretary shall take title to the SNF as expeditiously as practicable following commencement of operation of a repository. In return for the payment of fees, section 302(a) also stipulates that the contracts provide that the Secretary, beginning not later than January 31, 1998 will dispose of such SNF.

\1\ In this notice, we limit our discussion to SNF, because that is the primary concern of the utilities with whom DOE has executed the Standard Contract.

DOE implemented the provisions of section 302(a) through rulemaking. Following notice and comment, DOE promulgated the Standard Contract for Disposal of Spent Nuclear Fuel and/or High Level Nuclear Waste (Standard Contract), which set forth the contractual terms under which the Department would make its disposal services available. 48 FR 16590 (April 18, 1983), codified at 10 CFR part 961. Under the terms of the final rule promulgating the Standard Contract, all civilian nuclear utilities desiring to dispose of SNF signed individual versions of the Standard Contract.

Although the Act originally envisioned that a geologic repository would be in operation, and DOE would be prepared to begin acceptance of SNF by January 31, 1998, it since has become apparent that neither a repository nor an

interim storage facility constructed under the Act will be available by 1998. DOE currently projects that the earliest possible date for acceptance of waste for disposal at a repository is 2010.

Accordingly, DOE published the Notice of Inquiry on Waste Acceptance Issues (NOI) to elicit the views of interested parties on:

(1) DOE's preliminary view that it does not have an obligation to accept SNF in the absence of an operational repository or interim storage facility constructed under the Act; (2) the need for interim storage prior to repository operation; and (3) use of the Nuclear Waste Fund to offset a portion of the financial burdens that may be incurred by utilities in continuing to store SNF at reactor sites beyond 1998.

Written comments were initially due on or before September 22, 1994. 59 FR 27007 (May 25, 1994). DOE extended the comment period on the NOI until December 19, 1994 to permit additional public comment. 59 FR 52524 (October 18, 1994).

II. Written Comments

DOE received 1,111 written responses to the NOI, representing 1,476 signatories, including utilities (38 responses), public utility commissions and utility regulators (26 responses), Federal, state, and local governments, agencies, and representatives (23 responses), industry representatives and companies (30 responses), public interest groups and other organizations (19 responses), and members of the general public (975 responses). All written comments received by DOE in response to the NOI were carefully reviewed and fully considered. The majority of the responses to the NOI addressed the issue of DOE's legal obligation to

accept SNF beginning in 1998 and asserted that DOE has an unconditional obligation to begin accepting SNF from the utilities by January 31, 1998.

DOE previously published a notice of the availability of DOE/RW-0462, "Summary of Responses to the Notice of Inquiry on Waste Acceptance Issues" (March 1995). 60 FR 14739 (March 20, 1995). That report contains a summary of all the comments received in response to the NOI.

This Notice sets forth DOE's conclusions with respect to the legal issues involved in the NOI. Section III below discusses DOE's final interpretation of its obligations with respect to the 1998 waste acceptance issue, addresses the issue of DOE's authority under the Act to provide interim storage, and also contains DOE's conclusions on the legal availability of the Nuclear Waste Fund to offset the potential financial burdens that may be incurred by utilities in storing SNF on-site beyond 1998.

III. Final Interpretation of Agency Obligations and Authorities Under the Act

Most of the commenters on the NOI expressed the view that the language in section 302(a)(5)(B) of the Act, which provides that "in return for the payment of fees established by this section, the Secretary, beginning not later than January 31, 1998, will dispose of the high-level radioactive waste or spent nuclear fuel as provided in this subtitle," 42 U.S.C. 10222(a)(5)(B), creates an unconditional legal obligation, beginning January 31, 1998, for DOE to initiate acceptance of SNF from utilities under the Standard Contract. According to these commenters, DOE's obligation is clear, non-discretionary, and not inconsistent with DOE's duty to take title to SNF under section 302(a)(5)(A) of the Act following commencement of repository operations. 42 U.S.C. 10222(a)(5)(A).

However, some commenters contended that DOE does not have an unconditional duty to dispose of SNF beginning in 1998 in the absence of an operational repository. They asserted that the obligations to take title and dispose of SNF established in subsections (5)(A) and (B) of section 302(a) of the Act must be read together and ultimately are dependent upon the existence of an operational repository. Based upon the entire statutory scheme and the legislative history of the Act, these commenters suggested that the January 31, 1998 date does not create an obligation to initiate SNF disposal regardless of the availability of a repository, but rather indicates the "sense of Congress" concerning an appropriate target date for arriving at a solution to the problem of accumulating high level nuclear waste and spent nuclear fuel.

After considering the views of the commenters, the provisions of the Act and its legislative history, and the terms and conditions of the Standard Contract, DOE has concluded that it does not have a legal obligation under either the Act or the Standard Contract to begin disposal of SNF by January 31, 1998, in the absence of a repository or interim storage facility constructed under the Act.

A. DOE's Final Interpretation of Its Obligations Under Section 302(a)(5)

1. The Act does not impose a statutory obligation on DOE to begin nuclear waste disposal in 1998 in the absence of a disposal or interim storage facility constructed under the Act. Section 302(a)(1) of the Act authorizes the Secretary of Energy to enter into contracts for acceptance of title, transportation, and disposal of SNF with any person who generates or holds title to spent fuel of domestic origin. 42 U.S.C. 10222(a)(1). Section 302(a)(5) states that such contracts shall provide that:

(A) Following commencement of operation of a repository, the Secretary shall take title to the high-level radioactive waste or spent nuclear fuel involved as expeditiously as practicable upon the request of the generator or owner of such waste or spent fuel; and (B) In return for payment of fees established by this section,
the Secretary, beginning not later than January 31, 1998, will dispose of the high-level radioactive waste or spent nuclear fuel involved as provided in this subtitle.

42 U.S.C. 10222(a)(5). DOE's Standard Contract contains a provision that reflects this statutory mandate. See 10 CFR 961.11.

a. Section 302(a)(5)(A), the so-called "take title" provision of the Act, requires that each contract executed by DOE under the Act provide that "the Secretary shall take title to the high-level radioactive waste or spent nuclear fuel involved as expeditiously as practicable upon request of the generator or owner of such waste or spent fuel," but specifically provides that the obligation to take title applies only "following commencement of operation of a repository." 42 U.S.C. 10222 (a)(5)(A). Thus, the Act is clear that DOE is required to take title "expeditiously," but only "following commencement of operation of a repository." 42 U.S.C. 10222 (a)(5)(A).

Section 302(a)(5)(B), the so-called "dispose" provision of the Act, requires that each contract shall also provide that "in return for payment of fees established by this section, the Secretary, beginning not later than January 31, 1998, will dispose of the high-level radioactive waste or spent fuel involved as provided in this subtitle." 42 U.S.C. 10222 (a)(5)(B). While the Act does not define the word "dispose," it does define "disposal." DOE believes that the words "dispose" and "disposal" are merely different grammatical forms of the same word, and that the Act's definition of

"disposal" also defines DOE's obligation to ``dispose" under section 302(a)(5)(B) of the Act. The Act defines ``disposal" to mean ``the emplacement in a repository of spent nuclear fuel with no foreseeable intent of recovery." 42 U.S.C. 10101(9). Thus, the mandate to dispose of SNF beginning January 31, 1998, like the duty to take title to SNF, requires the existence of an operating repository. See H.R. Rep. No. 491, Part 1, 97th Cong., 2d Sess. at 59 (1982).<SUP>2

\2\ DOE notes that the statutory language on disposal quoted above uses ``will" rather than the term ``shall" in setting forth the Secretary's duty to dispose of nuclear waste. DOE believes the use of the predictive term ``will" in the disposal provision of the Act, rather than the mandatory term ``shall" which is used in the take-title provision, indicates that the January 31, 1998 date expresses the sense of Congress as to when the Department should strive to have a repository in operation, rather than an unconditional legal obligation to initiate acceptance of SNF by a date certain.

The logic, language, and structure of section 302(a) require that the mandate to dispose and the duty to take title must be read together. Section 302(a)(1) of the Act, which authorizes the Secretary to enter in contracts with utilities ``for acceptance of title, subsequent transportation, and disposal of * * * (SNF)", indicates that the duty to accept title and the mandate to dispose are part of a sequential process: The Act contemplates that ``taking title" is a predicate to ``disposal". Similarly, section 123 of the Act provides that ``[d]elivery, and acceptance by the Secretary, of any high-level radioactive waste or spent nuclear fuel for a repository constructed under this subtitle (42 U.S.C. 10131 et seq., the repository subtitle) shall constitute a transfer to the Secretary of title to such waste or spent fuel." 42 U.S.C. 10143. The ``delivery and acceptance" provision of section 123 implements the ``take title" provision of section

302(a)(5)(A), and again contemplates that DOE "take title" prior to disposal in a repository.

b. Sections 302(a)(5) (A) and (B) of the Act must not only be read together, but also must be read in the context of the entire Act. When read in conjunction with other provisions in the Act, these provisions clearly do not contemplate nuclear waste disposal by DOE beginning January 31, 1998, in the absence of an operational repository.

The findings and purposes section of the Act states that "the Federal Government has the responsibility to provide for the permanent disposal of nuclear waste," 42 U.S.C. 10131(a)(4), and that the purpose of the Act is "to establish a schedule for the siting, construction, and operation of repositories that will provide a reasonable assurance that the public will be adequately protected from the hazards posed by high-level waste and such spent nuclear fuel as may be disposed of in a repository." 42 U.S.C. 10131 (b)(1). As noted above, the term "disposal" is defined in the Act to mean "emplacement of nuclear waste in a repository with no foreseeable intent of recovery."42 U.S.C. 10101 (9).

However, the Act imposes numerous prerequisites on the Department's ability to develop a repository and dispose of SNF that demonstrate that the Act did not contemplate that DOE would have an unconditional duty to begin disposing of SNF in 1998. For instance, the Act provides that only Yucca Mountain, in Nevada, is to be characterized as a potential repository site, 42 U.S.C 10172, and that DOE may not commence construction of a repository at Yucca Mountain unless and until the site been found suitable for a repository through the site characterization process, 42 U.S.C. 10134. The Act specifically recognizes that the Yucca Mountain site may be found unsuitable for development of a repository, and states that "if the Secretary at any time determines the Yucca Mountain site to be unsuitable for development as a

repository, the Secretary shall terminate all site characterization activities at such site * * * (and) reclaim the site to mitigate any significant adverse environmental impacts caused by site characterization at such site." 42 U.S.C. 10133(c)(3). Moreover, even if Yucca Mountain proves suitable, the Act imposes additional conditions on the actual development of the site as a repository. For example, the Act provides that the Secretary must decide whether to recommend approval of the site to the President; the President must determine whether he considers the site qualified; and if the President ultimately recommends development of the site to Congress, the host state may disapprove that recommendation for any reason at all, in which case an entirely new law must be enacted by Congress to override the host state's disapproval. 42 U.S.C. 10134 and 10135. Assuming site suitability, a favorable Presidential recommendation, and enactment of a new law to override any state notice of disapproval, the Act further requires DOE to obtain an NRC license to construct and operate a repository. 42 U.S.C. 10134(b).

Each of these statutory conditions for construction and operation of a repository represents a Congressionally-created contingency that could prevent or delay construction and operation of a repository. Given the number of these contingencies, Congress could not have intended to impose an unconditional obligation on DOE to take and dispose of SNF by a date certain.<SUP>3

\3\ In addition, as discussed infra, beginning at page 19, the Act contained only very limited authority for DOE to provide interim storage in the event that a repository is not in operation.

---

2. The legislative history of the Act confirms that both the "take title" and the "dispose" provisions of section 302(a)(5)

require an operating repository before their obligations attach.

Subparagraphs (A) and (B) of Section 302(a)(5) were originally part of section 124 of H.R. 3809. The House Report on H.R. 3809 stated that "Section 124 authorizes the Secretary to contract with utilities or other agents requiring use of repositories constructed under this Act to provide repository services in exchange for payments by repository users to cover program costs." H.R. Rep. No. 491, Part 1, 97th Cong., 2nd Sess. at 58 (1982). The House Report further stated that "[a]ll persons desiring to dispose of high level waste or spent fuel in repositories constructed under this subtitle are required to pay a ratable portion of the costs of such disposal." H.R. Rep. No. 491, Part 1, 97th Cong., 2d Sess. at 58 (April 27, 1982). As the quoted language indicates, the focus of section 124 was on contracting for the disposal of spent nuclear fuel in a repository.

With regard to what emerged as subparagraph (A) of section 302(a)(5), the House Committee Report on section 124 of H.R. 3809 stated:

Paragraph 4(A) requires that under such contracts the Secretary will be required to take title to high level waste or spent fuel, at the request of the generator, as expeditiously as practicable following the commencement of operation of a repository. H.R. Rep. No. 491, Part 1, 97th Cong., 2d Sess. at 59 (1982). Thus, subparagraph (A) in H.R. 3809, like subparagraph (A) in the Act, clearly made commencement of operation of a repository a condition precedent to taking title.

Significantly, the House Committee Report on H.R. 3809 also described the source of the current Act's subparagraph (B) in terms of the existence of a permanent disposal facility:

Paragraph 4(B) makes the Secretary responsible for

disposing of high level waste or spent fuel as provided under this subtitle in permanent disposal facilities, beginning not later than January 1998, in return for the payment of fees established by this section. *Id.* at 59. "This subtitle" referred to Subtitle A, "Repositories for Disposal of High-Level Radioactive Waste and Spent Nuclear Fuel," of which section 124 was then a part. Here too, as the underscored language and reference to Subtitle A make clear, the obligation contemplated depended upon the successful development of a repository.

The conclusion that section 302(a)(5) of the Act was not intended to create an obligation to dispose of SNF unless and until a repository had been developed is also supported by a floor statement made during the Senate's debate on the Act by the then Chairman of the Senate Energy and Natural Resources Committee, a primary sponsor of the Act, Senator James McClure. On December 13, 1982, Senators McClure, Simpson, Jackson, Johnston and Domenici offered amendment number 4983, which struck all the language after the enacting clause of H.R. 3809, and replaced it with a Senate version of the proposed legislation. Section 302 of the Senate amendment would have required DOE to take title and store or dispose of nuclear waste no later than December 31, 1996.

Unlike the House version of H.R. 3809, the Senate amendment made no mention of an operating repository. See 128 Cong. Rec. S14,484, S14,501 (daily ed. Dec. 13, 1982). However, after proposing the Senate amendment, Senator McClure then offered--and the Senate accepted—an amendment to section 302(a)(5) of the substitute amendment which brought the Senate version of that provision into conformity with the House version contained in H.R. 3809. Senator McClure described the effect of this amendment as follows:

Mr. President, this amendment amends section 302(a)(5) of the substitute amendment to provide that the Secretary of Energy take title to high-level waste or spent fuel as expeditiously as practicable upon the request of the generator of such waste. In addition, this amendment directs the Secretary to begin, not later than January 31, 1998, to begin to dispose of the high-level radioactive waste or spent nuclear fuel from those generating such waste. Under the substitute amendment, there was some concern that, in directing the Secretary to take title to and dispose of such wastes no later than December 31, 1996, we might not be giving the Secretary enough flexibility to tailor his schedule for accepting such wastes to the availability of a repository. This amendment simply directs the Secretary to take title to such wastes as expeditiously as practicable, upon the request of the generator of those wastes, after commencement of repository operation.

128 Cong. Rec. S15,657 (daily ed. Dec. 20, 1982). This summary of what section 302(a)(5) "directs" indicates that Congress did not intend to establish an inflexible schedule and that it intended to "tailor" DOE's obligation for accepting SNF to the availability of a repository, albeit that it intended for DOE to proceed "as expeditiously as practicable."<SUP>4

\4\ A few commenters claimed that certain statements from the legislative history of the monitored retrievable storage provisions of the Act support their assertion that DOE has an unconditional duty to accept SNF for disposal beginning in 1998. They cited the following statement of Senator Bennett Johnston, made during the floor debate on the 1987 amendments, as evidence of Congress' intent that the Department has an unconditional obligation to begin accepting waste in 1998:

The MRS is not an alternative to at-reactor storage, and it

is not a substitute for a repository. Utilities are required to take care of their own storage until 1998, but the Federal Government has a contractual commitment to take title to spent fuel beginning in 1998. An MRS will better ensure that the Department is able to meet this contractual commitment to accept spent fuel beginning in 1998.

133 Cong. Rec. S16,045 (daily ed. Nov. 10, 1987). The following statement of Senator James McClure from the same debate was also relied upon by a commenter:

Furthermore, we have an option to proceed with the construction of a monitored retrievable storage (MRS) facility for receipt and temporary storage of fuel by 1998 and thereby meet the Government's statutory obligation to begin taking spent fuel by that date.

133 Cong. Rec. S15,795 (daily ed. Nov. 10, 1987).

DOE believes that these 1987 statements do not supplant the foregoing analysis of what Congress intended when it enacted Section 302(a)(5), because they were not contemporaneous with passage of the Act in 1982. Post-enactment views by individual legislators are entitled to little weight in construing a statute enacted by a prior Congress.

---

3. The Standard Contract, which was promulgated through notice and comment rulemaking, implements the provisions of section 302(a)(5) of the Act.<SUP>5 Article II of the Standard Contract, entitled "Scope," states that "[t]he services to be provided by DOE under this contract shall begin, after commencement of facility operations, not later than January 31, 1998 and shall continue until such time as all (nuclear waste from the contracting utilities) has been disposed of." 10 CFR 961.11, Art. II.

\5\The U.S. Court of Appeals for the District of Columbia Circuit has held that the Standard Contract should be treated as more akin to a regulation, rather than a traditional contract, since its terms were established by rulemaking following notice and comment. Commonwealth Edison Co. v. United States Department of Energy, 877 F.2d 1042, 1045 (D.C. Cir. 1989).

Some commenters asserted that the language in Article II of the Standard Contract that "(t)he services to be provided by DOE under this contract shall begin * * * not later than January 31, 1998," either represents DOE's recognition of, or itself creates, an unconditional legal obligation to begin accepting nuclear waste by 1998. However, the Standard Contract contains the specific condition that the services to be provided by DOE "shall begin after commencement of facility operations." 10 CFR 961.11, Art. II.<SUP>6 One of the recitals in the preamble to the Standard Contract similarly indicates that the Department's obligations are conditioned upon the existence of an operational storage or disposal facility constructed under the Act:

\6\ Under the Standard Contract, the term "DOE facility" is defined to mean either a disposal or interim storage facility operated by or on behalf of DOE. See 10 CFR 961.11, Art. I.

Whereas, the DOE has the responsibility, following commencement of operation of a repository, to take title to the spent nuclear fuel or high-level radioactive waste involved as expeditiously as practicable upon the request of the generator or owner of such waste or spent nuclear fuel.

10 CFR 961.11, Preamble. The Standard Contract, like the Act, thus predicated DOE's obligation on the development of a facility under the Act.

This reading of the Standard Contract was confirmed by a statement of former Secretary Donald Hodel in 1984, the year following the promulgation of the Standard Contract. In a written response to a question posed in a letter from Senator Bennett Johnston, Secretary Hodel stated:

The Department is authorized to implement the Act through contractual commitments. To this end, the Department plans to incorporate into its contracts provisions which specify the minimum amount of spent fuel and waste which the Department will be obligated to accept, not later than January 31, 1998. Since these contracts have not yet been modified, it would be premature for the Department to speculate on particulars that might ultimately be incorporated in any or all of the contracts. However, it is my intention that this commitment in the Contracts, together with the overall thrust of the Act, will create an obligation for the Department to accept spent fuel in 1998 whether or not a repository is in operation.

Although former Secretary Hodel stated that he intended for DOE to assume an unconditional obligation to begin accepting SNF in 1998, he also recognized that the terms of the Standard Contract would have to be changed in order to create such an unconditional obligation. However, the Department never undertook a rulemaking to modify the Standard Contract. Thus, this essentially contemporaneous construction of the Standard Contract reinforces the conclusion that the Contract did not and does not create, or recognize, an unconditional obligation.<SUP>7

\7\One commenter on the NOI criticized DOE's denial of an obligation to begin accepting SNF from domestic utilities on the ground that DOE has accepted "foreign SNF" for storage at its own facilities. However, the authority for acceptance of foreign SNF arises under the Atomic Energy

Act, as amended, not under the Nuclear Waste Policy Act. The foreign fuel in question, which is not commercial SNF from domestic utilities but much smaller fuel elements from research reactors, contains highly enriched uranium that must be controlled for nuclear nonproliferation purposes. It is because of these nonproliferation concerns that the United States government has in some circumstances received foreign SNF under the Atomic Energy Act in order to remove it from international commerce. No Nuclear Waste Fund monies are (or could be) used for this storage activity.

B. Interim Storage Authority

The Department recognizes that some utilities are running out of on-site storage capacity and will have to provide additional storage capacity until a repository or interim storage facility is available. In response to the NOI, a number of comments stated that DOE should provide interim storage. However, DOE has concluded that it has no authority under the Act to provide interim storage in present circumstances.<SUP>8

\8\DOE's multi-purpose canister program is part of DOE's overall transportation strategy for disposal of SNF, and the use of Nuclear Waste Fund monies to support this work is authorized by Section 302(d)(4) of the Act, which provides that the Secretary may make expenditures from the Nuclear Waste Fund for any costs incurred in connection with the transportation of SNF.

Interim storage by DOE was contemplated by the Act in only two situations, neither of which currently applies. Under the Act, DOE had authority to offer a limited interim storage

option. See 42 U.S.C. 10156. However, that authority has, by its express terms, expired. Under the Act, DOE also has authority to provide for interim storage in an MRS. That authority also is inapplicable, however, because the Act ties construction of an MRS to the schedule for development of a repository. See 42 U.S.C. 10165, 10168. Because these are the only interim storage authorities provided by the Act, and because the Act expressly forbids use of the Nuclear Waste Fund to construct or expand any facility without express congressional authorization (42 U.S.C. 10222(d)), DOE lacks authority under the Act to provide interim storage services under present circumstances.

C. Use of Nuclear Waste Funds to Offset Financial Burdens to Utilities of Storing Nuclear Waste Beyond 1998

Section 302(d) of the Act states that the Nuclear Waste Fund may be used only for radioactive waste disposal activities under titles I and II of the Act, including a number of enumerated activities.<SUP>9 42 U.S.C. 10222(d). Paying for the costs of on-site storage is not enumerated in that provision.

\9\Section 302(d) further provides that no funds may be spent on construction or expansion of any facility unless expressly authorized.

Although the Act thus does not provide for use of the Nuclear Waste Fund to help utilities defray costs of on-site storage, if the Act were construed unconditionally to require DOE to begin providing disposal services in January of 1998 notwithstanding DOE's inability to do so, utilities might be entitled to financial relief under the terms of the Standard Contract. Since the Act itself does not address the consequences of a failure by DOE to perform its obligations under the Act, it has fallen to DOE as the administering

agency to fill the gap left by Congress. DOE has done so through the Standard Contract, which expressly addresses the situation in which performance by either party to the contract is delayed.

Under Article IX, entitled "DELAYS," the Standard Contract provides that neither party shall be liable for damages in the case of unavoidable delay and that the parties will adjust their schedules, as appropriate, to accommodate such delay. Art. IX, – A. In the case of an avoidable delay, however, the Standard Contract provides that the "charges and schedules specified by this contract will be equitably adjusted to reflect any estimated additional costs incurred by the party not responsible for or contributing to the delay." Art. IX, – B. Were DOE deemed to have an unconditional obligation to begin providing disposal services in 1998, we have concluded that the Delays Clause would be applicable in the event of a failure to perform. Were the Delays Clause to be invoked, Article XVI of the Standard Contract establishes the process for resolving disputed questions of fact (e.g., whether a delay has occurred and, if so, whether it was avoidable or unavoidable). Article XVI provides for initial resolution of disputed facts by the designated Contracting Officer, with a right of appeal to the DOE Board of Contract Appeals. In sum, it is the Department's view that, were the Act to be construed to impose an unconditional obligation to begin to provide disposal services in 1998, the appropriate remedy would be the contractual remedy under the Delays Clause and Article XVI.

D. Availability of Alternative Dispute Resolution Procedures

The Department believes that important public and private interests are implicated by the need for orderly financial and technical planning with respect to the Department's inability to accept SNF in 1998. There are also equitable cnsiderations that may argue for some form of relief to help offset costs

incurred as a result of the Department's inability to begin acceptance of SNF in 1998. The Department recognizes that these equitable and public interest considerations may be better addressed and resolved through settlement discussions than through litigation or through the process established by Article XVI of the Standard Contract. Therefore, in accordance with the Department's commitment to increased use of alternative dispute resolution procedures, the Department is prepared to discuss with utilities and other parties to the pending litigation (Northern States Power Company v. U.S. Department of Energy, Nos. 94-1457, 94-1458, 94-1574 (D.C. Cir., 1994)) financial or other assistance that may be appropriate in light of the Department's inability to begin providing disposal services in 1998.

Issued in Washington, D.C., April 28, 1995. Daniel A. Dreyfus, Director, Office of Civilian Radioactive Waste Management.

Copr. © West 1998 No Claim to Orig. U.S. Govt. Works

42 U.S.C.A. § 10222

UNITED STATES CODE ANNOTATED
TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 108–NUCLEAR WASTE POLICY
SUBCHAPTER III–OTHER PROVISIONS RELATING TO RADIOACTIVE WASTE

Copr. © West 1998. No Claim to Orig. U.S. Govt. Works

Current through P.L. 105-175, approved 5-11-98

§ 10222. Nuclear Waste Fund

(a) Contracts

(1) In the performance of his functions under this chapter, the Secretary is authorized to enter into contracts with any person who generates or holds title to high-level radioactive waste, or spent nuclear fuel, of domestic origin for the acceptance of title, subsequent transportation, and disposal of such waste or spent fuel. Such contracts shall provide for payment to the Secretary of fees pursuant to paragraphs (2) and (3) sufficient to offset expenditures described in subsection (d) of this section.

(2) For electricity generated by a civilian nuclear power reactor and sold on or after the date 90 days after January 7, 1983, the fee under paragraph (1) shall be equal to 1.0 mil per kilowatt-hour.

(3) For spent nuclear fuel, or solidified high-level radioactive waste derived from spent nuclear fuel, which fuel was used to generate electricity in a civilian nuclear power reactor prior to the application of the fee under paragraph (2) to such reactor,

the Secretary shall, not later than 90 days after January 7, 1983, establish a 1 time fee per kilogram of heavy metal in spent nuclear fuel, or in solidified high-level radioactive waste. Such fee shall be in an amount equivalent to an average charge of 1.0 mil per kilowatt- hour for electricity generated by such spent nuclear fuel, or such solidified high-level waste derived therefrom, to be collected from any person delivering such spent nuclear fuel or high-level waste, pursuant to section 10143 of this title, to the Federal Government. Such fee shall be paid to the Treasury of the United States and shall be deposited in the separate fund established by subsection (c) of this section. In paying such a fee, the person delivering spent fuel, or solidified high-level radioactive wastes derived therefrom, to the Federal Government shall have no further financial obligation to the Federal Government for the long-term storage and permanent disposal of such spent fuel, or the solidified high-level radioactive waste derived therefrom.

(4) Not later than 180 days after January 7, 1983, the Secretary shall establish procedures for the collection and payment of the fees established by paragraph (2) and paragraph (3). The Secretary shall annually review the amount of the fees established by paragraphs (2) and (3) above to evaluate whether collection of the fee will provide sufficient revenues to offset the costs as defined in subsection (d) of this section. In the event the Secretary determines that either insufficient or excess revenues are being collected, in order to recover the costs incurred by the Federal Government that are specified in subsection (d) of this section, the Secretary shall propose an adjustment to the fee to insure full cost recovery. The Secretary shall immediately transmit this proposal for such an adjustment to Congress. The adjusted fee proposed by the Secretary shall be effective after a period of 90 days of continuous session have elapsed following the receipt of such transmittal unless during such 90-day period either House of Congress adopts a resolution disapproving the Secretary's

proposed adjustment in accordance with the procedures set forth for congressional review of an energy action under section 6421 of this title.

(5) Contracts entered into under this section shall provide that--

(A) following commencement of operation of a repository, the Secretary shall take title to the high-level radioactive waste or spent nuclear fuel involved as expeditiously as practicable upon the request of the generator or owner of such waste or spent fuel; and

(B) in return for the payment of fees established by this section, the Secretary, beginning not later than January 31, 1998, will dispose of the high-level radioactive waste or spent nuclear fuel involved as provided in this subchapter.

(6) The Secretary shall establish in writing criteria setting forth the terms and conditions under which such disposal services shall be made available.

(b) Advance contracting requirement

(1)(A) The Commission shall not issue or renew a license to any person to use a utilization or production facility under the authority of section 2133 or 2134 of this title unless--

(i) such person has entered into a contract with the Secretary under this section; or

(ii) the Secretary affirms in writing that such person is actively and in good faith negotiating with the Secretary for a contract under this section.

(B) The Commission, as it deems necessary or appropriate, may require as a precondition to the issuance or renewal of a

license under section 2133 or 2134 of this title that the applicant for such license shall have entered into an agreement with the Secretary for the disposal of high-level radioactive waste and spent nuclear fuel that may result from the use of such license.

(2) Except as provided in paragraph (1), no spent nuclear fuel or high-level radioactive waste generated or owned by any person (other than a department of the United States referred to in section 101 or 102 of Title 5) may be disposed of by the Secretary in any repository constructed under this chapter unless the generator or owner of such spent fuel or waste has entered into a contract with the Secretary under this section by not later than--

(A) June 30, 1983; or

(B) the date on which such generator or owner commences generation of, or takes title to, such spent fuel or waste;

whichever occurs later.

(3) The rights and duties of a party to a contract entered into under this section may be assignable with transfer of title to the spent nuclear fuel or high-level radioactive waste involved.

(4) No high-level radioactive waste or spent nuclear fuel generated or owned by any department of the United States referred to in section 101 or 102 of Title 5 may be disposed of by the Secretary in any repository constructed under this chapter unless such department transfers to the Secretary, for deposit in the Nuclear Waste Fund, amounts equivalent to the fees that would be paid to the Secretary under the contracts referred to in this section if such waste or spent fuel were generated by any other person.

(c) Establishment of Nuclear Waste Fund

There hereby is established in the Treasury of the United States a separate fund, to be known as the Nuclear Waste Fund. The Waste Fund shall consist of--

(1) all receipts, proceeds, and recoveries realized by the Secretary under subsections (a), (b), and (e) of this section, which shall be deposited in the Waste Fund immediately upon their realization;

(2) any appropriations made by the Congress to the Waste Fund; and

(3) any unexpended balances available on January 7, 1983, for functions or activities necessary or incident to the disposal of civilian high-level radioactive waste or civilian spent nuclear fuel, which shall automatically be transferred to the Waste Fund on such date.

(d) Use of Waste Fund

The Secretary may make expenditures from the Waste Fund, subject to subsection (e) of this section, only for purposes of radioactive waste disposal activities under subchapters I and II of this chapter, including--

(1) the identification, development, licensing, construction, operation, decommissioning, and post-decommissioning maintenance and monitoring of any repository, monitored, retrievable storage facility or test and evaluation facility constructed under this chapter;

(2) the conducting of nongeneric research, development, and demonstration activities under this chapter;

(3) the administrative cost of the radioactive waste disposal program;

(4) any costs that may be incurred by the Secretary in connection with the transportation, treating, or packaging of spent nuclear fuel or high-level radioactive waste to be disposed of in a repository, to be stored in a monitored, retrievable storage site or to be used in a test and evaluation facility;

(5) the costs associated with acquisition, design, modification, replacement, operation, and construction of facilities at a repository site, a monitored, retrievable storage site or a test and evaluation facility site and necessary or incident to such repository, monitored, retrievable storage facility or test and evaluation facility; and

(6) the provision of assistance to States, units of general local government, and Indian tribes under sections 10136, 10138, and 10199 of this title.

No amount may be expended by the Secretary under this subchapter for the construction or expansion of any facility unless such construction or expansion is expressly authorized by this or subsequent legislation. The Secretary hereby is authorized to construct one repository and one test and evaluation facility.

(e) Administration of Waste Fund

(1) The Secretary of the Treasury shall hold the Waste Fund and, after consultation with the Secretary, annually report to the Congress on the financial condition and operations of the Waste Fund during the preceding fiscal year.

(2) The Secretary shall submit the budget of the Waste Fund to the Office of Management and Budget triennially along with the budget of the Department of Energy submitted at such time in accordance with chapter 11 of Title 31. The budget of

the Waste Fund shall consist of the estimates made by the Secretary of expenditures from the Waste Fund and other relevant financial matters for the succeeding 3 fiscal years, and shall be included in the Budget of the United States Government. The Secretary may make expenditures from the Waste Fund, subject to appropriations which shall remain available until expended. Appropriations shall be subject to triennial authorization.

(3) If the Secretary determines that the Waste Fund contains at any time amounts in excess of current needs, the Secretary may request the Secretary of the Treasury to invest such amounts, or any portion of such amounts as the Secretary determines to be appropriate, in obligations of the United States--

(A) having maturities determined by the Secretary of the Treasury to be appropriate to the needs of the Waste Fund; and

(B) bearing interest at rates determined to be appropriate by the Secretary of the Treasury, taking into consideration the current average market yield on outstanding marketable obligations of the United States with remaining periods to maturity comparable to the maturities of such investments, except that the interest rate on such investments shall not exceed the average interest rate applicable to existing borrowings.

(4) Receipts, proceeds, and recoveries realized by the Secretary under this section, and expenditures of amounts from the Waste Fund, shall be exempt from annual apportionment under the provisions of subchapter II of chapter 15 of Title 31.

(5) If at any time the moneys available in the Waste Fund are insufficient to enable the Secretary to discharge his

responsibilities under this subchapter, the Secretary shall issue to the Secretary of the Treasury obligations in such forms and denominations, bearing such maturities, and subject to such terms and conditions as may be agreed to by the Secretary and the Secretary of the Treasury. The total of such obligations shall not exceed amounts provided in appropriation Acts. Redemption of such obligations shall be made by the Secretary from moneys available in the Waste Fund. Such obligations shall bear interest at a rate determined by the Secretary of the Treasury, which shall be not less than a rate determined by taking into consideration the average market yield on outstanding marketable obligations of the United States of comparable maturities during the month preceding the issuance of the obligations under this paragraph. The Secretary of the Treasury shall purchase any issued obligations, and for such purpose the Secretary of the Treasury is authorized to use as a public debt transaction the proceeds from the sale of any securities issued under chapter 31 of Title 31, and the purposes for which securities may be issued under such Act are extended to include any purchase of such obligations. The Secretary of the Treasury may at any time sell any of the obligations acquired by him under this paragraph. All redemptions, purchases, and sales by the Secretary of the Treasury of obligations under this paragraph shall be treated as public debt transactions of the United States.

(6) Any appropriations made available to the Waste Fund for any purpose described in subsection (d) of this section shall be repaid into the general fund of the Treasury, together with interest from the date of availability of the appropriations until the date of repayment. Such interest shall be paid on the cumulative amount of appropriations available to the Waste Fund, less the average undisbursed cash balance in the Waste Fund account during the fiscal year involved. The rate of such interest shall be determined by the Secretary of the Treasury taking into consideration the average market yield during the

month preceding each fiscal year on outstanding marketable obligations of the United States of comparable maturity. Interest payments may be deferred with the approval of the Secretary of the Treasury, but any interest payments so deferred shall themselves bear interest.

CREDIT(S)

1995 Main Volume

(Pub.L. 97-425, Title III, § 302, Jan. 7, 1983, 96 Stat. 2257.)

Copr. © West 1998 No Claim to Orig. U.S. Govt. Works

42 U.S.C.A. § 10139

UNITED STATES CODE ANNOTATED
TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 108--NUCLEAR WASTE POLICY
SUBCHAPTER I--DISPOSAL AND STORAGE OF HIGH-LEVEL RADIOACTIVE WASTE, SPENT NUCLEAR FUEL, AND LOW-LEVEL RADIOACTIVE WASTE
PART A--REPOSITORIES FOR DISPOSAL OF HIGH-LEVEL RADIOACTIVE WASTE AND SPENT NUCLEAR FUEL

Copr. © West 1998. No Claim to Orig. U.S. Govt. Works

Current through P.L. 105-175, approved 5-11-98

§ 10139. Judicial review of agency actions

(a) Jurisdiction of United States courts of appeals

(1) Except for review in the Supreme Court of the United States, the United States courts of appeals shall have original and exclusive jurisdiction over any civil action--

(A) for review of any final decision or action of the Secretary, the President, or the Commission under this part;

(B) alleging the failure of the Secretary, the President, or the Commission to make any decision, or take any action, required under this part;

(C) challenging the constitutionality of any decision made, or action taken, under any provision of this part;

(D) for review of any environmental impact statement prepared pursuant to the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) with respect to any action under this subtitle, or as required under section 10155(c)(1) of this title, or alleging a failure to prepare such statement with respect to any such action;

(E) for review of any environmental assessment prepared under section 10132(b)(1) or 10155(c)(2) of this title; or

(F) for review of any research and development activity under subchapter II of this chapter.

(2) The venue of any proceeding under this section shall be in the judicial circuit in which the petitioner involved resides or has its principal office, or in the United States Court of Appeals for the District of Columbia.

(c) [FN1] Deadline for commencing action

A civil action for judicial review described under subsection (a)(1) of this section may be brought not later than the 180th day after the date of the decision or action or failure to act involved, as the case may be, except that if a party shows that he did not know of the decision or action complained of (or of the failure to act), and that a reasonable person acting under the circumstances would not have known, such party may bring a civil action not later than the 180th day after the date such party acquired actual or constructive knowledge of such decision, action, or failure to act.

CREDIT(S)

1995 Main Volume

(Pub.L. 97-425, Title I, § 119, Jan. 7, 1983, 96 Stat. 2227.)

TITLE 10--ENERGY

CHAPTER III--DEPARTMENT OF ENERGY

PART 961--STANDARD CONTRACT FOR DISPOSAL OF SPENT NUCLEAR FUEL AND/OR HIGH-LEVEL RADIOACTIVE WASTE

Subpart A --General

Sec. 961.1 Purpose.

This part establishes the contractual terms and conditions under which the Department of Energy (DOE) will make available nuclear waste disposal services to the owners and generators of spent nuclear fuel (SNF) and high-level radioactive waste (HLW) as provided in section 302 of the Nuclear Waste Policy Act of 1982 (Pub. L. 97-425). Under the contract set forth in Sec. 961.11 of this part, DOE will take title to, transport, and dispose of spent nuclear fuel and/or high-level radioactive waste delivered to DOE by those owners or generators of such fuel or waste who execute the contract. In addition, the contract will specify the fees owners and generators of SNF and/or HLW will pay for these services. All receipts, proceeds, and revenues realized by DOE under the contract will be deposited in the Nuclear Waste Fund, an account established by the Act in the U.S. Treasury. This fund will pay for DOE's radioactive waste disposal activities, the full costs of which will be borne by the owners and generators under contract with DOE for disposal services.

Sec. 961.2 Applicability.

This part applies to the Secretary of Energy or his designee

and any person who owns or generates spent nuclear fuel or high-level radioactive waste, of domestic origin, generated in a civilian nuclear power reactor. If executed in a timely manner, the contract contained in this part will commit DOE to accept title to, transport, and dispose of such spent fuel and waste. In exchange for these services, the owners or generators of such fuel or waste shall pay fees specified in the contract which are intended to recover fully the costs of the disposal services to be furnished by DOE. The contract must be signed by June 30, 1983, or by the date on which such owner or generator commences generation of, or takes title to, such spent fuel or waste, whichever occurs later.

Sec. 961.3 Definitions. For purposes of this part - *Act* means the Nuclear Waste Policy Act of 1982, Public Law 97-425, 96 Stat. 2201 et seq., 42 U.S.C. 10101 et seq.

Contract means the agreement set forth in Sec. 961.11 of this part and any duly executed amendment or modification thereto.

Generator means any person who is licensed by the Nuclear Regulatory Commission to use a utilization or production facility under the authority of section 103 or 104 of the Atomic Energy Act of 1954 (42 U.S.C. 2133, 2134).

Owner means any person who has title to spent nuclear fuel or high-level radioactive waste.

Purchaser means any person, other than a Federal agency, who is licensed by the Nuclear Regulatory Commission to use a utilization or production facility under the authority of sections 103 or 104 of the Atomic Energy Act of 1954 (42 U.S.C. 2133, 2134) or who has title to spent nuclear fuel or high level radioactive waste and who has executed a contract with DOE.

Secretary means the Secretary of Energy of his designee. Other definitions relating to the subject matter of this rule are set forth in Article II of the contract which is contained in Sec. 961.11, Text of the contract, of this part.

Sec. 961.4 Deviations.

Requests for authority to deviate from this part shall be submitted in writing to the Contracting Officer, who shall forward the request for approval to the Senior Procurement Official, Headquarters. Each request for deviation shall contain the following information:

(a) A statement of the deviation desired, including identification of the specific paragraph number(s) of the contract;

(b) A description of the intended effect of the deviation;

(c) The reason why the deviation is considered necessary or would be in the best interests of the Government;

(d) The name of the owner or generator seeking the deviation and nuclear power reactor(s) affected;

(e) A statement as to whether the deviation has been requested previously and, if so, circumstances of the previous request;

(f) A statement of the period of time for which the deviation is needed; and

(g) Any pertinent background information will contribute to a full understanding of the desired deviation.

Sec. 961.5 Federal agencies.

Federal agencies or departments requiring DOE's disposal services for SNF and/or HLW will be accommodated by a suitable interagency agreement reflecting, as appropriate, the terms and conditions set forth in the contract in Sec. 961.11; Provided, however, that the fees to be paid by Federal agencies will be equivalent to the fees that would be paid under the contract.

Sec. 961.11 Text of the contract.

The text of the standard contract for disposal of spent nuclear fuel and/or high/level radioactive waste follows:

U.S. Department of Energy Contract No. ----

Contract for Disposal of Spent Nuclear Fuel and/or High-Level Radioactive Waste

THIS CONTRACT, entered into this -- day of ------ 19--, by and between the UNITED STATES OF AMERICA (hereinafter referred to as the "Government"), represented by the UNITED STATES DEPARTMENT OF ENERGY (hereafter referred to as "DOE") and ----------, (hereinafter referred to as the "Purchaser"), a corporation organized and existing under the laws of the State of ---------- [add as applicable: "acting on behalf of itself and ------."].

Witnesseth that:

Whereas, the DOE has the responsibility for the disposal of spent nuclear fuel and high-level radioactive waste of domestic origin from civilian nuclear power reactors in order to protect the public health and safety, and the environment; and

Whereas, the DOE has the responsibility, following

commencement of operation of a repository, to take title to the spent nuclear fuel or high-level radioactive waste involved as expeditiously as practicable upon the request of the generator or owner of such waste or spent nuclear fuel; and

Whereas, all costs associated with the preparation, transportation, and the disposal of spent nuclear fuel and high-level radioactive waste from civilian nuclear power reactors shall be borne by the owners and generators of such fuel and waste; and

Whereas, the DOE is required to collect a full cost recovery fee from owners and generators delivering to the DOE such spent nuclear fuel and/or high level radioactive waste; and

Whereas, the DOE is authorized to enter into contracts for the permanent disposal of spent nuclear fuel and/or high-level radioactive waste of domestic origin in DOE facilities; and

Whereas, the Purchaser desires to obtain disposal services from DOE; and

Whereas, DOE is obligated and willing to provide such disposal services, under the terms and conditions hereinafter set forth; and

Whereas, this contract is made and entered into under the authority of the DOE Organization Act (Pub. L. 95-91, 42 U.S.C. 7101 et seq.) and the Nuclear Waste Policy Act of 1982 (Pub. L. 97-425, 42 U.S.C. 10101 et seq.)

Now, therefore, the parties hereto do hereby agree as follows:

Article I --Definitions

As used throughout this contract, the following terms shall have the meanings set forth below:

1. The term assigned three-month period means the period that each Purchaser will be assigned by DOE, giving due consideration to the Purchaser's assignment preference, for purposes of reporting kilowatt hours generated by the Purchaser's nuclear power reactor and for establishing fees due and payable to DOE.

2. The term cask means a container for shipping spent nuclear fuel and/or high-level radioactive waste which meets all applicable regulatory requirements.

3. The term civilian nuclear power reactor means a civilian nuclear powerplant required to be licensed under sections 103 or 104(b) of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2133, 2134(b)).

4. The term Commission means the United states Nuclear Regulatory Commission.

5. The term contract means this agreement and any duly executed amendment or modification thereto.

6. The term Contracting Officer means the person executing this contract on behalf of the Government, and any other officer or civilian employee who is a properly designated Contracting Officer of the DOE; and the term includes, except as otherwise provided in this contract, the authorized representative of a Contracting Officer acting within the limits of his authority.

7. The term delivery means the transfer of custody, f.o.b. carrier, of spent nuclear fuel or high-level radioactive waste

from Purchaser to DOE at the Purchaser's civilian nuclear power reactor or such other domestic site as may be designated by the Purchaser and approved by DOE.

8. The term disposal means the emplacement in a repository of high-level radioactive waste, spent nuclear fuel, or other highly radioactive waste with no foreseeable intent of recovery, whether or not such emplacement permits recovery of such waste.

9. The term DOE means the United States Department of Energy or any duly authorized representative thereof, including the Contracting Officer.

10. The term DOE facility means a facility operated by or on behalf of DOE for the purpose of disposing of spent nuclear fuel and/or high-level radioactive waste, or such other facility(ies) to which spent nuclear fuel and/or high-level radioactive waste may be shipped by DOE prior to its transportation to a disposal facility.

11. The term full cost recovery, means the recoupment by DOE, through Purchaser fees and any interest earned, of all direct costs, indirect costs, and all allocable overhead, consistent with generally accepted accounting principles consistently applied, of providing disposal services and conducting activities authorized by the Nuclear Waste Policy Act of 1982 (Pub. L. 97-425). As used herein, the term cost includes the application of Nuclear Waste Fund moneys for those uses expressly set forth in section 302 (d) and (e) of the said Act and all other uses specified in the Act.

12. The term high-level radioactive waste (HLW) means--

(a) the highly radioactive material resulting from the reprocessing of spent nuclear fuel, including liquid waste produced directly in reprocessing and any solid material

derived from such liquid waste that contains fission products in sufficient concentrations; and

(b) other highly radioactive material that the Commission, consistent with existing law, determines by rule requires permanent isolation.

13. The term electricity (kilowatt hours) generated and sold means gross electrical output produced by a civilian nuclear power reactor measured at the output terminals of the turbine generator minus the normal onsite nuclear station service loads during the time electricity is being generated multiplied by the total energy adjustment factor. For purposes of this provision, the following definition shall apply:

a. The term Total Energy Adjustment Factor (TEAF) means the sum of individual owners' weighted energy adjustment factors.

b. The term Weighted Energy Adjustment Factor (WEAF) means the product of an owner's energy adjustment factor times the owner's share of the plant.

c. The term Owner's Energy Adjustment Factor (OEAF) means the sum of the individual owner's adjustment for sales to ultimate consumers and adjustment for sales for resale.

d. The term Owner's Share of the plant (OS) means the owner's fraction of metered electricity sales, the owner's fraction of plant ownership, or the sponsor company's fixed entitlement percentage of the plant's output. This definition includes joint owners of generating companies or participants in a generation and transmission cooperative.

e. The term *Adjustment for Sales to ultimate Consumer (ASC)* means the owner's fraction of sales to the ultimate

consumer multiplied by the owner's sales to ultimate consumer adjustment factor.

f. The term *Fraction of Sales to ultimate Consumer (FSC)* means the owner's fractional quantity of electricity sold to the ultimate consumer relative to the total of electricity sales (sales to ultimate consumers plus the sales for resale).

g. The term *Sales to ultimate Consumer Adjustment Factor (SCAF)* means one minus the quotient of all electricity lost or otherwise not sold for each owner divided by the total electricity available for disposition to ultimate consumers. Electricity lost or otherwise not sold includes:

(1) Energy furnished without charge;
(2) Energy used by the company;
(3) Transmission losses;
(4) Distribution losses; and
(5) Other unaccounted losses as reported to the Federal Government "Annual Report of Major Electric Utilities, Licensees and Others," Federal Energy Regulatory Commission (FERC) Form No.1; Rural Electrification Administration (REA) Forms 7 and 11 if appropriate; or the "Annual Electric Utility Report," Energy Information Administration (EIA) Form EIA-861.

h. The term *Total Electricity Available for Disposition to Ultimate Consumers* means the reporting year's total of all of a utility's electricity supply which is available for disposition, expressed in kilowatt hours, and is equal to the sum of the energy sources minus the electricity sold for resale by the utility.

i. The term *Adjustment for Sales for Resale (ASR)* means the owner's fraction of sales for resale multiplied by the national average adjustment factor.

j. The term *Fraction of Sales for Resale (FSR)* means the

owner's fractional quantity of electricity sold for resale by the utility relative to the total of electricity sales.

k. The term *National Average Adjustment Factor (NAF)* means the ratio of the national total of electricity sold to the national total of electricity available for disposition, based on the most recent 3 years of national data provided to the Federal Government, and will be set by the Contracting Officer. This term will be evaluated annually and revised in increments of .005.

l. Pumped storage losses. If the proportion of nuclear generated electricity consumed by a pumped-storage hydro facility can be measured or estimated and if the electricity losses associated with pumped storage facilities can be documented (e.g. based on routine and uniform records of district power data on contributions from different electricity sources), a prorated nuclear share shall be allowed as an offset to gross electricity generation reported on the annex A of appendix G, NWPA-830G form. Specific methodologies for calculating these offsets must be approved by the Contracting Officer in advance.

Instructions to annex A of appendix G, NWPA-830G provide the necessary information to calculate the energy adjustment factors.

14. The term *metric tons uranium* means that measure of weight, equivalent to 2,204.6 pounds of uranium and other fissile and fertile material that are loaded into a reactor core as fresh fuel.

15. The term *Purchaser's site* means the location of Purchaser's civilian nuclear power reactor or such other location as the Purchaser may designate.

16. The term *quarterly Treasury rate* means the current

value of funds rate as specified by the Treasury Fiscal Requirements Manual, Volume 1, Part 6, section 8020.20. This rate is published quarterly in the Federal Register prior to the beginning of the affected quarter.

17. The term *shipping lot* means a specified quantity of spent nuclear fuel or high-level radioactive waste designated by Purchaser for delivery to DOE beginning on a specified date.

18. The term *spent nuclear fuel (SNF)* means fuel that has been withdrawn from a nuclear reactor following irradiation, the consistituent elements of which have not been separated by reprocessing.

19. The term *spent nuclear fuel and high-level radioactive waste of domestic origin* means irradiated fuel material used, and radioactive wastes resulting from such use, in nuclear power reactors located only in the United States.

20. The term *year* means the period which begins on October 1 and ends on September 30.

Article II --Scope

This contract applies to the delivery by Purchaser to DOE of SNF and/or HLW of domestic origin from civilian nuclear power reactors, acceptance of title by DOE to such SNF and/or HLW, subsequent transportation, and disposal of such SNF and/or HLW and, with respect to such material, establishes the fees to be paid by the Purchaser for the services to be rendered hereunder by DOE. The SNF and/or HLW shall be specified in a delivery commitment schedule as provided in Article V below. The services to be provided by DOE under this contract shall begin, after commencement of facility operations, not later than January 31, 1998 and shall continue until such time as all SNF and/or HLW from

the civilian nuclear power reactors specified in appendix A, annexed hereto and made a part hereof, has been disposed of.

Article III --Term

The term of this contract shall be from the date of execution until such time as DOE has accepted, transported from the Purchaser's site(s) and disposed of all SNF and/or HLW of domestic origin from the civilian nuclear power reactor(s) specified in appendix A.

Article IV -- Responsibilities of the Parties

A. Purchaser's Responsibilities

1. Discharge Information.

(a) On an annual basis, commencing October 1, 1983, the Purchaser shall provide DOE with information on actual discharges to date and projected discharges for the next ten (10) years in the form and content set forth in appendix B, annexed hereto and made a part hereof. The information to be provided will include estimates and projections and will not be Purchaser's firm commitment with respect to discharges or deliveries.

(b) No later than October 1, 1983, the Purchaser shall provide DOE with specific information on:

(1) Total spent nuclear fuel inventory as of April 7, 1983;

(2) Total number of fuel assemblies removed from the particular reactor core prior to 12:00 a.m. April 7, 1983 for which there are plans for reinsertion in the core, indicating the current planned dates for reinsertion in the core. Estimates of the burned and unburned portion of each individual assembly are to be provided.

(c) In the event that the Purchaser fails to provide the

annual forecast in the form and content required by DOE, DOE may, in its sole discretion, require a rescheduling of any delivery commitment schedule then in effect.

2. Preparation for Transportation.

(a) The Purchaser shall arrange for, and provide, all preparation, packaging, required inspections, and loading activities necessary for the transportation of SNF and/or HLW to the DOE facility. The Purchaser shall notify DOE of such activities sixty (60) days prior to the commencement of such activities. The preparatory activities by the Purchaser shall be made in accordance with all applicable laws and regulations relating to the Purchaser's responsibilities hereunder. DOE may designate a representative to observe the preparatory activities conducted by the Purchaser at the Purchaser's site, and the Purchaser shall afford access to such representative.

(b) Except as otherwise agreed to by DOE, the Purchaser shall advise DOE, in writing as specified in appendix F, annexed hereto and made a part hereof, as to the description of the material in each shipping lot sixty (60) days prior to scheduled DOE transportation of that shipping lot.

(c) The Purchaser shall be responsible for incidental maintenance, protection and preservation of any and all shipping casks furnished to the Purchaser by DOE for the performance of this contract. The Purchaser shall be liable for any loss of or damage to such DOE-furnished property, and for expenses incidental to such loss or damage while such casks are in the possession and control of the Purchaser except as otherwise provided for hereunder. Routine cask maintenance, such as scheduled overhauls, shall not be the responsibility of the Purchaser.

B. DOE Responsibilities

1. DOE shall accept title to all SNF and/or HLW, of domestic origin, generated by the civilian nuclear power reactor(s) specified in appendix A, provide subsequent transportation for such material to the DOE facility, and dispose of such material in accordance with the terms of this contract.

2. DOE shall arrange for, and provide, a cask(s) and all necessary transportation of the SNF and/or HLW from the Purchaser's site to the DOE facility. Such cask(s) shall be furnished sufficiently in advance to accommodate scheduled deliveries. Such cask(s) shall be suitable for use at the Purchaser's site, meet applicable regulatory requirements, and be accompanied by pertinent information including, but not limited to, the following:

(a) Written procedures for cask handling and loading, including specifications on Purchaser-furnished cannisters for containment of failed fuel;
(b) Training for Purchaser's personnel in cask handling and loading, as may be necessary;
(c) Technical information, special tools, equipment, lifting trunnions, spare parts and consumables needed to use and perform incidental maintenance on the cask(s); and
(d) Sufficient documentation on the equipment supplied by DOE.

3. DOE may fulfill any of its obligations, or take any action, under this contract either directly or through contractors.

4. DOE shall annually provide to the Purchaser pertinent information on the waste disposal program including information on cost projections, project plans and progress reports.

5. (a) Beginning on April 1, 1991, DOE shall issue an annual acceptance priority ranking for receipt of SNF and/or HLW at the DOE repository. This priority ranking shall be based on the age of SNF and/or HLW as calculated from the date of discharge of such material from the civilian nuclear power reactor. The oldest fuel or waste will have the highest priority for acceptance, except as provided in paragraphs B and D of Article V and paragraph B.3 of Article VI hereof.

(b) Beginning not later than July 1, 1987, DOE shall issue an annual capacity report for planning purposes. This report shall set forth the projected annual receiving capacity for the DOE facility(ies) and the annual acceptance ranking relating to DOE contracts for the disposal of SNF and/or HLW including, to the extent available, capacity information for ten (10) years following the projected commencement of operation of the initial DOE facility.

Article V -- Delivery of SNF and/or HLW

A. *Description of SNF and HLW*

The Purchaser shall deliver to DOE and DOE shall, as provided in this contract, accept the SNF and/or HLW which is described in accordance with Article VI.A. of this contract, for disposal thereof.

B. *Delivery Commitment Schedule*

1. Delivery commitment schedule(s), in the form set forth in appendix C annexed hereto and made a part hereof, for delivery of SNF and/or HLW shall be furnished to DOE by Purchaser. After DOE has issued its proposed acceptance priority ranking, as described in paragraph B.5 of Article IV hereof, beginning January 1, 1992 the Purchaser shall submit to DOE the delivery commitment schedule(s) which shall identify all SNF and/or HLW the Purchaser wishes to deliver

to DOE beginning sixty-three (63) months thereafter. DOE shall approve or disapprove such schedules within three (3) months after receipt. In the event of disapproval, DOE shall advise the Purchaser in writing of the reasons for such disapproval and request a revised schedule from the Purchaser, to be submitted to DOE within thirty (30) days after receipt of DOE's notice of disapproval.

2. DOE shall approve or disapprove such revised schedule(s) within sixty (60) days after receipt. In the event of disapproval, DOE shall advise the Purchaser in writing of the reasons for such disapproval and shall submit its proposed schedule(s). If these are not acceptable to the Purchaser, the parties shall promptly seek to negotiate mutually acceptable schedule(s). Purchaser shall have the right to adjust the quantities of SNF and/or HLW plus or minus (^{plus-minus}) twenty percent (20%), and the delivery schedule up to two (2) months, until the submission of the final delivery schedule.

C. Final Delivery Schedule

Final delivery schedule(s), in the form set forth in appendix D, annexed hereto and made a part hereof, for delivery of SNF and/or HLW covered by an approved delivery commitment schedule(s) shall be furnished to DOE by Purchaser. The Purchaser shall submit to DOE final delivery schedules not less than twelve (12) months prior to the delivery date specified therein. DOE shall approve or disapprove a final delivery schedule within forty-five (45) days after receipt. In the event of disapproval, DOE shall advise the Purchaser in writing of the reasons for such disapproval and shall request a revised schedule from the Purchaser, to be submitted to DOE within thirty (30) days after receipt of DOE's notice of disapproval. DOE shall approve or disapprove such revised schedule(s) within sixty (60) days after receipt. In the event of disapproval, DOE

shall advise the Purchaser in writing of the reasons for such disapproval and shall submit its proposed schedule(s). If these are not acceptable to the Purchaser, the parties shall promptly seek to negotiate mutually acceptable schedule(s).

D. *Emergency Deliveries*

Emergency deliveries of SNF and/or HLW may be accepted by DOE before the date provided in the delivery commitment schedule upon prior written approval by DOE.

E. *Exchanges*

Purchaser shall have the right to determine which SNF and/or HLW is delivered to DOE; provided, however, that Purchaser shall comply with the requirements of this contract. Purchaser shall have the right to exchange approved delivery commitment schedules with parties to other contracts with DOE for disposal of SNF and/or HLW; provided, however, that DOE shall, in advance, have the right to approve or disapprove, in its sole discretion, any such exchanges. Not less than six (6) months prior to the delivery date specified in the Purchaser's approved delivery commitment schedule, the Purchaser shall submit to DOE an exchange request, which states the priority rankings of both the Purchaser hereunder and any other Purchaser with whom the exchange of approved delivery commitment schedules is proposed. DOE shall approve or disapprove the proposed exchange within thirty (30) days after receipt. In the event of disapproval, DOE shall advise the Purchaser in writing of the reasons for such disapproval.

Article VI -- Criteria for Disposal

A. General Requirements

1. *Criteria.*

(a) Except as otherwise provided in this contract, DOE shall accept hereunder only such SNF and/or HLW which meets the General Specifications for such fuel and waste as set forth in appendix E, annexed hereto and made a part hereof.

(b) Purchaser shall accurately classify SNF and/or HLW prior to delivery in accordance with paragraphs B and D of appendix E.

2. *Procedures.*

(a) Purchaser shall provide to DOE a detailed description of the SNF and/or HLW to be delivered hereunder in the form and content as set forth in appendix F, annexed hereto and made a part hereof. Purchaser shall promptly advise DOE of nay changes in said SNF and/or HLW as soon as they become known to the purchaser.

(b) DOE's obligation for disposing of SNF under this contract also extends to other than standard fuel; however, for any SNF which has been designated by the Purchaser as other than standard fuel, as that term is defined in appendix E, the Purchaser shall obtain delivery and procedure confirmation from DOE prior to delivery. DOE shall advise Purchaser within sixty (60) days after receipt of such confirmation request as to the technical feasibility of disposing of such fuel on the currently agreed to schedule and any schedule adjustment for such services.

B. *Acceptance Procedures*

1. *Acceptance Priority Ranking.*

Delivery commitment schedules for SNF and/or HLW may require the disposal or more material than the annual capacity of the DOE disposal facility (or facilities) can accommodate. The following acceptance priority ranking will be utilized:

(a) Except as may be provided for in subparagraph (b) below and Article V.D. of this contract, acceptance priority shall be based upon the age of the SNF and/or HLW as calculated from the date of discharge of such material from the civilian nuclear power reactor. DOE will first accept from Purchaser the oldest SNF and/or HLW for disposal in the DOE facility, except as otherwise provided for in paragraphs B and D of Article V.

(b) Notwithstanding the age of the SNF and/or HLW, priority may be accorded any SNF and/or HLW removed from a civilian nuclear power reactor that has reached the end of its useful life or has been shut down permanently for whatever reason.

2. *Verification of SNF and/or HLW.*

During cask loading and prior to acceptance by DOE for transportation to the DOE facility, the SNF and/or HLW description of the shipping lot shall be subject to verification by DOE. To the extent the SNF and/or HLW is consistent with the description submitted and approved, in accordance with appendices E and F, DOE agrees to accept such SNF and/or HLW for disposal when DOE has verified the SNF and/or HLW description, determined the material is properly loaded, packaged, marked, labeled and ready for transportation, and has taken custody, as evidenced in

writing, of the material at the Purchaser's site, f.o.b. carrier. A properly executed off-site radioactive shipment record describing cask contents must be prepared by the Purchaser along with a signed certification which states: "This is to certify that the above-named materials are properly described, classified, packaged, marked and labeled and are in proper condition for transfer according to the applicable regulations of the U. S. Department of Transportation."

3. *Improperly described SNF and/or HLW.*

(a) *Prior to Acceptance*-- If SNF and/or HLW is determined by DOE to be improperly described prior to acceptance by DOE at the Purchaser's site, DOE shall promptly notify the Purchaser in writing of such determination. DOE reserves the right, in its sole discretion, to refuse to accept such SNF and/or HLW until the SNF and/or HLW has been properly described. The Purchaser shall not transfer such SNF and/or HLW to DOE unless DOE agrees to accept such SNF and/or HLW under such other arrangements as may be agreed to, in writing, by the parties.

(b) *After Acceptance*-- If subsequent to its acceptance DOE finds that such SNF and/or HLW is improperly described, DOE shall promptly notify the Purchaser, in writing, of such finding. In the event of such notification, Purchaser shall provide DOE with a proper designation within thirty (30) days. In the event of a failure by the Purchaser to provide such proper designation, DOE may hold in abeyance any and all deliveries scheduled hereunder.

Article VII --Title

Title to all SNF and/or HLW accepted by DOE for disposal shall pass to DOE at the Purchaser's site as provided for in Article VI hereof. DOE shall be solely responsible for

control of all material upon passage of title. DOE shall have the right to dispose as it sees fit of any SNF and/or HLW to which it has taken title. The Purchaser shall have no claim against DOE or the Government with respect to such SNF or HLW nor shall DOE or the Government be obligated to compensate the Purchaser for such material.

Article VIII --Fees and Terms of Payment

A. Fees

1. Effective April 7, 1983, Purchaser shall be charged a fee in the amount of 1.0 mill per kilowatt hour (1M/kWh) electricity generated and sold.

2. For SNF, or solidified high-level radioactive waste derived from SNF, which fuel was used to generate electricity in a civilian nuclear power reactor prior to April 7, 1983, a one-time fee will be assessed by applying industry-wide average dollar per kilogram charges to four (4) distinct ranges of fuel burnup so that the integrated cost across all discharged (i.e. spent) fuel is equivalent to an industry-wide average charge of 1.0 mill per kilowatt-hour. For purposes of this contract, discharged nuclear fuel is that fuel removed from the reactor core with no plans for reinsertion. In the event that any such fuel withdrawn with plans for reinsertion is not reinserted, then the applicable fee for such fuel shall be calculated as set forth in this paragraph 2. The categories of spent nuclear fuel burnup and the fee schedule are listed below:

[In 1982 dollars]

Nuclear spent fuel burnup range	Dollars per kilogram
0 to 5,000 MWDT/MTU	$80.00
5,000 to 10,000 MWDT/MTU	142.00
10,000 to 20,000 MWDT/MTU	162.00
Over 20,000 MWDT/MTU	184.00

This fee shall not be subject to adjustment, and the payment thereof by the Purchaser shall be made to DOE as specified in paragraph B of this Article VIII.

3. For in-core fuel as of April 7, 1983, that portion of the fuel burned through April 6, 1983 shall be subject to the one-time fee as calculated in accordance with the following methodology: [a] determine the total weight in kilograms of unranium loaded initially in the particular core; [b] determine the total megawatt-days (thermal) which have been generated by all of the fuel assemblies in the said core as of 12:00 A.M. April 7, 1983; [c] divide the megawatt-days (thermal) generated in the said core by the total metric tons of initially loaded uranium in that core and multiply the quotient by the conversion factor 0.0078 to obtain a value in dollars per kilogram; and [d] multiply the dollars per kilogram value by the kilograms determined in [a] above to derive the dollar charge for the one-time fee to be paid for the specified in-core fuel as of 12:00 A.M. April 7, 1983. For purposes of this contract, in-core fuel is that fuel in the reactor core as of the date specified, plus any fuel removed from the reactor with plans for reinsertion. That portion of such fuel unburned as of 12:00 A.M. April 7, 1983 shall be subject to the 1.0 mill per kilowatt-hour charge.

4. DOE will annually review the adequacy of the fees and adjust the 1M/KWH fee, if necessary, in order to assure full cost recovery by the Government. Any proposed adjustment to the said fee will be transmitted to Congress and shall be effective after a period of ninety (90) days of continuous session has elapsed following receipt of such transmittal unless either House of Congress adopts a resolution disapproving the proposed adjustment. Any adjustment to the 1M/KWH fee under paragraph A.1. of this Article VIII shall be prospective.

B. Payment

1. For electricity generated and sold by the Purchaser's civilian nuclear power reactor(s) on or after April 7, 1983, fees shall be paid quarterly by the Purchaser and must be received by DOE not later than the close of the last business day of the month following the end of each assigned 3-month period. The first payment shall be due on July 31, 1983, for the period April 7, 1983, to June 30, 1983. (Add as applicable: A one-time adjustment period payment shall be due on _____, for the period _____ to _____.) The assigned 3-month period, for purposes of payment and reporting of electricity generated and sold shall begin _____.

2. For SNF discharged prior to April 7, 1983, and for in-core burned fuel as of 12:00 A.M. April 7, 1983, the Purchaser shall, within two (2) years of contract execution, select one of the following fee payment options:

(a) *Option 1*-- The Purchaser's financial obligation for said fuel shall be prorated evenly over forty (40) quarters and will consist of the fee plus interest on the outstanding fee balance. The interest from April 7, 1983, to date of the first payment is to be calculated based upon the 13-week Treasury bill rate, as reported on the first such issuance following April 7,

1983, and compounded quarterly thereafter by the 13-week Treasury bill rates as reported on the first such issuance of each succeeding assigned three-month period. Beginning with the first payment, interest is to be calculated on Purchaser's financial obligation plus accrued interest, at the ten-year Treasury note rate in effect on the date of the first payment. In no event shall the end of the forty (40) quarters extend beyond the first scheduled delivery date as reflected in the DOE-approved delivery commitment schedule. All payments shall be made concurrently with the assigned three month period payments. At any time prior to the end of the forty (40) quarters, Purchaser may, without penalty, make a full or partial lump sum payment at any of the assigned three month period payment dates. Subsequent quarterly payments will be appropriately reduced to reflect the reduction in the remaining balance in the fee due and payable. The remaining financial obligation, if any, will be subject to interest at the same ten-year Treasury note rate over the remainder of the ten year period.

(b) *Option 2*-- The Purchaser's financial obligation shall be paid in the form of a single payment anytime prior to the first delivery, as reflected in the DOE approved delivery commitment schedule, and shall consist of the fee plus interest on the outstanding fee balance. Interest is to be calculated from April 7, 1983, to the date of the payment based upon the 13-week Treasury bill rate, as reported on the first such issuance following April 7, 1983, and compounded quarterly thereafter by the 13-week Treasury bill rates as reported on the first such issuance of each succeeding assigned three-month period until payment.

(c) *Option 3*-- The Purchaser's financial obligation shall be paid prior to June 30, 1985, or prior to two (2) years after contract execution, whichever comes later, in the form of a single payment and shall consist of all outstanding fees for SNF and in-core fuel burned prior to April 7, 1983. Under

this option, no interest shall be due to DOE from April 7, 1983, to the date of full payment on the outstanding fee balance.

3. Method of Payment:

(a) Payments shall be made by wire transfer, in accordance with instructions specified by DOE in appendix G, annexed hereto and made a part hereof, and must be received within the time periods specified in paragraph B.1. of this Article VIII.

(b) The Purchaser will complete a Standard Remittance Advice, as set forth in appendix G, for each assigned three month period payment, and mail it postmarked no later than the last business day of the month following each assigned three month period to Department of Energy, Office of Controller, Cash Management Division, Box 500, Room D-208, Germantown, Maryland 20874.

4. Any fees not paid on a timely basis or underpaid because of miscalculation will be subject to interest as specified in paragraph C of this Article VIII.

C. *Interest on Late Fees*

1. DOE will notify the Purchaser of amounts due only when unpaid or underpaid by the dates specified in paragraph B above. Interest will be levied according to the following formula:

Interest = Unpaid balance due to DOE for assigned three month period x Quarterly Treasury rate plus six percent (6%) x Number of months late including month of payment (fractions rounded up to whole months) / 12

2. Interest is payable at any time prior to the due date for the subsequent assigned three month period fee payment. Nonpayment by the end of the subsequent assigned three month period will result in compounding of interest due. Purchaser shall complete a Standard Remittance Advice of interest payments.

3. Following the assessment of a late fee by DOE, payments will be applied against accrued interest first and the principal thereafter.

D. *Effect of Payment*

Upon payment of all applicable fees, interest and penalties on unpaid or underpaid amounts, the Purchaser shall have no further financial obligation to DOE for the disposal of the accepted SNF and/or HLW.

E. *Audit*

1. The DOE or its representative shall have the right to perform any audits or inspections necessary to determine whether Purchaser is paying the correct amount under the fee schedule and interest provisions set forth in paragraphs A, B and C above.

2. Nothing in this contract shall be deemed to preclude an audit by the General Accounting Office of any transaction under this contract.

3. The Purchaser shall furnish DOE with such records, reports and data as may be necessary for the determination of quantities delivered hereunder and for final settlement of amounts due under this contract and shall retain and make available to DOE and its authorized representative examination at all reasonable times such records, reports and data for a period of three (3) years from the completion of

delivery of all material under this contract.

Article IX -- Delays

A. *Unavoidable Delays by Purchaser or DOE*

Neither the Government nor the Purchaser shall be liable under this contract for damages caused by failure to perform its obligations hereunder, if such failure arises out of causes beyond the control and without the fault or negligence of the party failing to perform. In the event circumstances beyond the reasonable control of the Purchaser or DOE--such as acts of God, or of the public enemy, acts of Government in either its sovereign or contractual capacity, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes and unusually severe weather --cause delay in scheduled delivery, acceptance or transport of SNF and/or HLW, the party experiencing the delay will notify the other party as soon as possible after such delay is ascertained and the parties will readjust their schedules, as appropriate, to accommodate such delay.

B. *Avoidable Delays by Purchaser or DOE*

In the event of any delay in the delivery, acceptance or transport of SNF and/or HLW to or by DOE caused by circumstances within the reasonable control of either the Purchaser or DOE or their respective contractors or suppliers, the charges and schedules specified by this contract will be equitably adjusted to reflect any estimated additional costs incurred by the party not responsible for or contributing to the delay.

Article X –Suspension

A. In addition to any other rights DOE may have hereunder, DOE reserves the right, at no cost to the

Government, to suspend this contract or any portion thereof upon written notice to the Purchaser within ninety (90) days of the Purchaser's failure to perform its obligations hereunder, and the Purchaser's failure to take corrective action within thirty (30) days after written notice of such failure to perform as provided above, unless such failure shall arise from causes beyond the control and without the fault or negligence of the Purchaser, its contractors or agents. However, the Purchaser's obligation to pay fees required hereunder shall continue unaffected by any suspension. Any such suspension shall be rescinded if and when DOE determines that Purchasers completed corrective action.

B. The DOE reserves the right to suspend any scheduled deliveries in the event that a national emergency requires that priority be given to Government programs to the exclusion of the work under this contract. In the event of such a suspension by the Government, the DOE shall refund that portion of payments representing services not delivered as determined by the Contracting Officer to be an equitable adjustment. Any disagreement arising from the refund payment, if any, shall be resolved as provided in the clause of this contract, entitled "DISPUTES."

Article XI --Remedies

Nothing in this contract shall be construed to preclude either party from asserting its rights and remedies under the contract or at law.

Article XII --Notices

All notices and communications between the parties under this contract (except notices published in the Federal Register) shall be in writing and shall be sent to the following addressees:

ToDOE:_____

_____

_____

_____

TothePurchaser:_____

_____

_____

_____

_____

However, the parties may change the addresses or addressees for such notices or communications without formal modification to this contract; provided, however, that notice of such changes shall be given by registered mail.

Article XIII --Representation Concerning Nuclear Hazards Indemnity

A. DOE represents that it will include in its contract(s) for the operation of any DOE facility an indemnity agreement based upon Section 170(d) of the Atomic Energy Act of 1954, as amended, a copy of which agreement shall be furnished to the Purchaser; that under said agreement, DOE shall have agreed to indemnify the contractor and other persons indemnified against claims for public liability (as defined in said Act) arising out of or in connection with contractual activities; that the indemnity shall apply to covered nuclear incidents which (1) take place at a contract location; or (2) arise out of or in the course of transportation of source, special nuclear or by-product material to or from a contract location. The obligation of DOE to indemnify shall be subject to the conditions stated in the indemnity agreement.

B. The provisions of this Article XIII shall continue beyond the term of this contract.

Article XIV --Assignment

The rights and duties of the Purchaser may be assignable with transfer of title to the SNF and/or HLW involved; provided, however, that notice of any such transfer shall be made to DOE within ninety (90) days of transfer.

Article XV --Amendments

The provisions of this contract has been developed in the light of uncertainties necessarily attendant upon long-term contracts. Accordingly, at the request of either DOE or Purchaser, the parties will negotiate and, to the extent mutually agreed, amend this contract as the parties may deem to be necessary or proper to reflect their respective interests; provided, however, that any such amendment shall be consistent with the DOE final rule published in the Federal Register on April 18, 1983 entitled, "Standard Contract for Disposal or SNF and/or HLW", as the same may be amended from time to time.

Article XVI --Disputes

A. Except as otherwise provided in this contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Purchaser. The decision of the Contracting Officer shall be final and conclusive unless within ninety (90) days from the date of receipt of such copy, the Purchasermails or otherwise furnishes to the Contracting Officer a written appeal addressed to the DOE Board of Contract Appeals (Board). The decision of the Board shall be final and conclusive unless determined by a court of competent jurisdiction to have been fraudulent, or capricious,

or arbitrary, or so grossly erroneous as necessarily to imply bad faith or not supported by substantial evidence. In connection with any appeal proceeding under this clause, the Purchaser shall proceed diligently with the performance of the contract and in accordance with the Contracting Officer's decision.

B. For Purchaser claims of more than $50,000, the Purchaser shall submit with the claim a certification that the claim is made in good faith; the supporting data are accurate and complete to the best of the Purchaser's knowledge and belief; and the amount requested accurately reflects the contract adjustment for which the Purchaser believes the Government is liable. The certification shall be executed by the Purchaser if an individual. When the Purchaser is not an individual, the certification shall be executed by a senior company official in charge at the Purchaser's plant or location involved, or by an officer or general partner of the Purchaser having overall responsibility for the conduct of the Purchaser's affairs.

C. For Purchaser claims of $50,000 or less, the Contracting Officer must render a decision within sixty (60) days. For Purchaser claims in excess of $50,000, the Contracting Officer must decide the claim within sixty (60) days or notify the Purchaser of the date when the decision will be made.

D. This "Disputes" clause does not preclude consideration of law questions in connection with decisions provided for in paragraph A above; provided, however, that nothing in this contract shall be construed as making final the decision of any administrative official, representative, or board on a question of law.

Article XVII --Officials Not To Benefit

No member of or delegate to Congress or resident commissioner shall be admitted to any share or part of this contract, or to any benefit that may arise therefrom, but this provision shall not be construed to extend to this contract if made with a corporation for its general benefit.

Article XVIII --Covenant Against Contingent Fees

The Purchaser warrants that no person or selling agency has been employed or retained to solicit or secure this contract upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, excepting bona fide employees or bona fide established commercial or selling agencies maintained by the Purchaser for the purpose of securing business. For breach or violation of this warranty, the Government shall have the right to annul this contract without liability or in its discretion to increase the contract price or consideration, or otherwise recover, the full amount of such commission, brokerage, or contingent fee.

Article XIX --Examination of Records

The Purchaser agrees that the Comptroller General of the United States or any of his duly authorized representatives shall have access to and the right to examine any directly pertinent books, documents, papers and records of the Purchaser involving transactions related to this contract until the expiration of three years after final payment under this contract.

Article XX --Permits

The Government and the Purchaser shall procure all necessary permits or licenses (including any special nuclear material licenses) and comply with all applicable laws and regulations of the United States, States and municipalities

necessary to execute their respective responsibilities and obligations under this contract.

Article XXI --Rights in Technical Data

A. Definitions.

1. *Technical data* means recorded information regardless of form or characteristic, of a specific or technical nature. It may, for example, document research, experimental, developmental, or demonstration, or engineering work, or be usable or used to define a design or process, or to procure, produce, support, maintain or operate material. The data may be graphic or pictorial delineations in media such as drawings or photographs, text in specifications or related performance or design-type documents or computer software (including computer programs, computer software data bases, and computer software documentation). Examples of technical data include research and engineering data, engineering drawings and associated lists, specifications, standards, process sheets, manuals, technical reports, catalog item identification, and related information. Technical data as used herein do not include financial reports, cost analyses, and other information incidental to contract administration.

2. *Proprietary data* means technical data which embody trade secrets developed at private expense, such as design procedures or techniques, chemical composition of materials, or manufacturing methods, processes, or treatments, including minor modifications thereof, provided that such data:

(a) Are not generally known or available from other sources without obligation concerning their confidentiality;

(b) Have not been made available by the owner to others without obligation concerning its confidentiality; and

(c) Are not already available to the Government without

obligation concerning their confidentiality.

3. *Contract data* means technical data first produced in the performance of the contract, technical data which are specified to be delivered under the contract, or technical data actually delivered in connection with the contract.

4. *Unlimited rights* means rights to use, duplicate, or disclose technical data, in whole or in part, in any manner and for any purpose whatsoever, and to permit others to do so.

B. *Allocation of Rights.*

1. The Government shall have:

(a) Unlimited rights in contract data except as otherwise provided below with respect to proprietary data properly marked as authorized by this clause;

(b) The right to remove, cancel, correct or ignore any marking not authorized by the terms of this contract on any technical data furnished hereunder, if in response to a written inquiry by DOE concerning the proprietary nature of the markings, the Purchaser fails to respond thereto within 60 days or fails to substantiate the proprietary nature of the markings. In either case, DOE will notify the Purchaser of the action taken;

(c) No rights under this contract in any technical data which are not contract data.

2. Subject to the foregoing provisions of this rights in technical data clause, the Purchaser shall have the right to mark proprietary data it furnishes under the contract with the following legend and no other, the terms of which shall be binding on the Government:

Limited Rights Legend

This "proprietary data," furnished under "Contract No. ----" with the U.S. Department of Energy may be duplicated and used by the Government with the express limitations that the ``proprietary data" may not be disclosed outside the Government or be used for purposes of manufacture without prior permission of the Purchaser, except that further disclosure or use may be made solely for the following purposes:

(a) This ``proprietary data" may be disclosed for evaluation purposes under the restriction that the ``proprietary data" be retained in confidence and not be further disclosed;

(b) This ``proprietary data" may be disclosed to contractors participating in the Government's program of which this contract is a part, for information or use in connection with the work performed under their contracts and under the restriction that the ``proprietary data" be retained in confidence and not be further disclosed; or

(c) This ``proprietary data" may be used by the Government or others on its behalf for emergency work under the restriction that the ``proprietary data" be retained in confidence and not be further disclosed. This legend shall be marked on any reproduction of this data in whole or in part.

3. In the event that proprietary data of a third party, with respect to which the Purchaser is subject to restrictions on use or disclosure, is furnished with the Limited Rights Legend above, Purchaser shall secure the agreement of such third party to the rights of the Government as set forth in the Limited Rights Legend. DOE shall upon request furnish the names of those contractors to which proprietary data has

been disclosed.

Article XXII --Entire Contract

A. This contract, which consists of Articles I through XXII and appendices A through G, annexed hereto and made a part hereof, contains the entire agreement between the parties with respect to the subject matter hereof. Any representation, promise, or condition not incorporated in this contract shall not be binding on either party. No course of dealing or usage of trade or course of performance shall be relevant to explain or supplement any provision contained in this contract.

B. Nothing in this contract is intended to affect in any way the contractual obligation of any other persons with whom the Purchaser may have contracted with respect to assuming some or all disposal costs or to accept title to SNF and/or HLW.

C. Appendices

A. Nuclear Power Reactor(s) or Other Facilities Covered
B. Discharge Information (Ten Year; Annual)
C. Delivery Commitment Schedule
D. Final Delivery Schedule
E. General Specifications
F. Detailed Description of Purchaser's Fuel
G. Standard Remittance Advice For Payment of Fees

In witness whereof, the parties hereto have executed this contract as of the day and year first above written.

United States of America
United States Department of Energy

By:_____
(Contracting Officer)

Witnesses as to Execution on Behalf of Purchaser

(Name)_____
(Address)_____
(Name)_____
(Address)_____

(Purchaser's Company Name)
By:_____
Title:_____

I, (Name), certify that I am the (Title) of the corporation named as Purchaser herein; that (Name) who signed this document on behalf of the Purchaser was then (Title) of said corporation; that said document was duly signed for and on behalf of said corporation by authority of its governing body and is within the scope of its corporate powers.

In Witness Whereof, I have hereunto affixed my hand and the seal of said corporation this ---- day of ----, 1983

(Corporate Seal)

(Signature)_____

Appendix A

Nuclear Power Reactor(s) or Other Facilities Covered

Purchaser_____
Contract Number/Date----/----_____
Reactor/Facility Name_____
Location:
Street_____
City_____
County/State--------/_____
Zip Code_____
Capacity(MWE)--Gross_____

Reactor Type:
BWR {time}
PWR {time}
Other(Identify)_____
Facility Description_____
Date of Commencement of Operation_____
(actual or estimated)
NRC License:_____

By Purchaser:
Signature_____
Title_____
Date_____

Appendix B

Ten Year Discharge Forecast

To be used for DOE planning purposes only and does not represent a firm commitment by Purchaser.

Purchaser_____
Contract Number/Date/_____
Reactor/Facility Name_____
Location:
Street_____
City_____
County/State/_____
Zip Code_____
Type: BWR {time}
PWR {time}
Other
(Identify)_____

	1	2	3	4	5	6	7	8	9	10	10 yr total
Discharge date--mo/yr (or refueling shut down date)											
Metric tons:											
--initial											
--discharged											
Number of assemblies discharged (per cycle)											

By Purchaser:
Signature_____
Title_____
Date_____

Appendix B (Enclosure 1)

Actual Discharges

Purchaser_____
Contract
Number/Date_____
Reactor/Facility
Name_____
Location:
Street_____
City_____
County/State_____
Zip Code_____
Type:
BWR {time}
PWR {time}
Other
(Identify)_____
Refueling
Shutdown Date_____
Metric Tons Uranium (Initial/Discharged);
Initial_____
Discharged_____
Number of Assemblies Discharged:_____

Any false, fictitious or fraudulent statement may be punishable by fine or imprisonment (U.S. Code, Title 18, Section 1001).

By Purchaser:

Signature_____
Title_____
Date_____

Appendix C

Delivery Commitment Schedule

This delivery commitment schedule shall be submitted by Purchaser to DOE as specified in Article V.B. of this contract.

Purchaser_____
Contract
Number/Date_____
Reactor/Facility
Name_____
Location:
Street_____
City_____
County/State_____
Zip Code_____
Type Cask Required:_____
Shipping Lot Number_____
(Assigned by DOE)
Proposed Shipping Mode:
Truck {time}
Rail {time}
Barge {time}
DOE Assigned Delivery Commitment
Date_____
Range of Discharge Date(s) (Earliest to Latest)
Mo---- Day---- Yr---- to Mo---- Day---- Yr----
Metric Tons Uranium:
Initial)_____
(Discharged)_____
Number of Assemblies:
BWR_____
PWR_____

Other_____

Unless otherwise agreed to in writing by DOE, the Purchaser shall furnish herewith to DOE suitable proof of ownership of the SNF and/or HLW to be delivered hereunder. The Purchaser shall notify DOE in writing at the earliest practicable date of any change in said ownership.

Any false, fictitious or fraudulent statement may be punishable by fine or imprisonment (U.S. Code, Title 18, Section 1001).

By Purchaser:

Signature_____

Title_____

Date_____

Approved by DOE:

Technical Representative_____

Title_____

Date_____

Contracting Officer_____

Date_____

Appendix D

Final Delivery Schedule

(To be submitted to DOE by Purchaser for each designated Purchaser Delivery site not later than twelve (12) months prior to estimated date of first delivery)

Purchaser:_____

Contract
Number/Date_____

Reactor/Facility
Name_____

Location:

Street_____

City_____

County/State_____

Zip Code_____

Type(s) cask(s) required:_____

No. Assemblies per cask_____

Shipping Lot Number_____

Shipping Mode:
(Assigned by DOE)

Truck_____

Rail_____

Barge_____

Metric Tons Uranium:

(Initial)_____

(Discharged)_____

Range of Discharge Date(s) (Earliest to Latest)
(From approved commitment schedule)

Mo---- Day---- Yr---- to Mo---- Day---- Yr----

Number of Assemblies:

BWR_____

PWR_____

Other_____

Purchaser's Delivery First Estimate

Mo---- Day---- Yr---- last Mo---- Day---- Mo----

Unless otherwise agreed to in writing by DOE, the Purchaser shall furnish herewith to DOE suitable proof of ownership of the SNF and/or HLW to be delivered hereunder. The Purchaser shall notify DOE in writing at the earliest practicable date of any change in said ownership.

To confirm acceptability of delivery date(s):

Purchaser Contact_____

Phone_____

Title_____

DOE Contact_____

Phone_____

Title_____

Any false, fictitious or fraudulent statement may be punishable by fine or imprisonment (U.S. Code, Title 18, Section 1001).

By Purchaser:

Signature_____

Title_____

Date_____

Approved by DOE:

Technical Representative_____

Title_____

Date_____

Contracting

Officer_____

Date_____

Appendix E

General Specifications

A. Fuel Category Identification

1. Categories--Purchaser shall use reasonable efforts, utilizing technology equivalent to and consistent with the commercial practice, to properly classify Spent Nuclear Fuel (SNF) prior to delivery to DOE, as follows:

a. *Standard Fuel* means SNF that meets all the General Specifications therefor set forth in paragraph B below.

b. *Nonstandard Fuel* means SNF that does not meet one or more of the General Specifications set forth in subparagraphs 1 through 5 of paragraph B below, and which is classified as Nonstandard Fuel Classes NS-1 through NS-5, pursuant to paragraph B below.

c. *Failed Fuel* means SNF that meets the specifications set forth in subparagraphs 1 through 3 of paragraph B below, and which is classified as Failed Fuel Class F-1 through F-3 pursuant to subparagraph 6 of
paragraph B below.

d. Fuel may have "Failed Fuel" and/or several "Nonstandard Fuel" classifications

B. *Fuel Description and Subclassification—General Specifications*

1. Maximum Nominal Physical Dimensions.

	Boiling water reactor (BWR)	Pressurized water reactor (PWR)
Overall Length.....	14 feet, 11 inches	14 feet, 10 inches.
Active Fuel Length.....	12 feet, 6 inches.	12 feet, 0 inches.
Cross Section \1\.....	6 inches x 6 inches.	9 inches x 9 inches.

\1\ The cross section of the fuel assembly shall not include the channel.

Note: Fuel that does not meet these specifications shall be classified as Nonstandard Fuel--Class NS-1.

2. *Nonfuel Components.* Nonfuel components including, but not limited to, control spiders, burnable poison rod assemblies, control rod elements, thimble plugs, fission chambers, and primary and secondary neutron sources, that are contained within the fuel assembly, or BWR channels that are an integral part of the fuel assembly, which do not require special handling, may be included as part of the spent nuclear fuel delivered for disposal pursuant to this contract.

Note: Fuel that does not meet these specifications shall be classified as Nonstandard Fuel--Class NS-2.

3. *Cooling.* The minimum cooling time for fuel is five (5) years.

Note: Fuel that does not meet this specification shall be classified as Nonstandard Fuel--Class NS-3.

4. Non-LWR Fuel. Fuel from other than LWR power facilities shall be classified as Nonstandard Fuel--Class NS-4. Such fuel may be unique and require special handling, storage, and disposal facilities.

5. Consolidated Fuel Rods. Fuel which has been disassembled and stored with the fuel rods in a consolidated manner shall be classified as Nonstandard Fuel Class NS-5.

6. Failed Fuel.

a. Visual Inspection.

Assemblies shall be visually inspected for evidence of structural deformity or damage to cladding or spacers which may require special handling. Assemblies which [i] are structurally deformed or have damaged cladding to the extent that special handling may be required or [ii] for any reason cannot be handled with normal fuel handling equipment shall be classified as Failed Fuel--Class F-1.

b. Previously Encapsulated Assemblies.

Assemblies encapsulated by Purchaser prior to classification hereunder shall be classified as Failed Fuel--Class F-3. Purchaser shall advise DOE of the reason for the prior encapsulation of assemblies in sufficient detail so that DOE may plan for appropriate subsequent handling.

c. Regulatory Requirements.

Spent fuel assemblies shall be packaged and placed in casks so that all applicable regulatory requirements are met.

C. *Summary of Fuel Classifications*

1. Standard Fuel:
a. Class S-1: PWR
b. Class S-2: BWR
2. Nonstandard Fuel:
a. Class NS-1: Physical Dimensions
b. Class NS-2: Non Fuel Components
c. Class NS-3: Short Cooled
d. Class NS-4: Non-LWR
e. Class NS-5: Consolidated Fuel Rods.
3. Failed Fuel:
a. Class F-1: Visual Failure or Damage
b. Class F-2: Radioactive "Leakage"
c. Class F-3: Encapsulated

D. *High-Level Radioactive Waste*

The DOE shall accept high-level radioactive waste. Detailed acceptance criteria and general specifications for such waste will be issued by the DOE no later than the date on which DOE submits its license application to the Nuclear Regulatory Commission for the first disposal facility.

Appendix F

Detailed Description of Purchaser's Fuel

This information shall be provided by Purchaser for each distinct fuel type within a Shipping Lot not later than sixty (60) days prior to the schedule transportation date.

Purchaser_____

Contract Number/Date _____/_____

Reactor/FacilityName--_____

_____

I. Drawings included in generic dossier: _____

1. Fuel Assembly DWG ----
2. Upper & Lower end fittings DWG ----

Dossier Number: ----

DOE Shipping Lot : ----

Assemblies Described:

------BWR
------PWR
------Other

II. *Design Material Descriptions.*

Fuel Element:

1. Element type ---- (rod, plate, etc.)
2. Total length) ----/(in.)
3. Active length ---- (in.)
4. Cladding material ---- (Zr, s.s., etc.)

Assembly Description:

1. Number of Elements ----
2. Overall dimensions (length ---- (cross section) ---- (in.)
3. Overall weight ----

III. Describe any distortions, cladding damage or other damage to the spent fuel, or nonfuel components within this Shipping Lot which will require special handling procedures. (Attach additional pages if needed.)

_____

_____

IV. Assembly Number _____

Shipping Lot _____

	Irradiation history cycle No.				
	1	2	3	4	5
1. Startup date (mo/day/yr).....					
2. Shutdown date (mo/day/yr).....					
3. Cumulative fuel exposure (mwd/mtu).....					
4. Avg. reactor power (mwth).....					
5. Total heat output/assembly in watts, using an approved calculational method: -------- as of Date --------					

Any false, fictitious or fradulent statement may be punishable by fine or imprisonment (U.S. Code, Title 18, Section 1001).

By Purchaser:

Signature_____

Title_____

Date_____

APPENDIX G – STANDARD REMITTANCE ADVICE FOR PAYMENT OF FEES

[GRAPHIC] [TIFF OMITTED] TC01OC91.035

ANNEX A TO APPENDIX G
[GRAPHIC] [TIFF OMITTED] TC01OC91.036

ANNEX A TO APPENDIX G
[GRAPHIC] [TIFF OMITTED] TC01OC91.037

Annex B to Appendix G

Standard Remittance of Advice (RA) for Payment of Fees

This Annex should be completed only for SNF burned before midnight between April 6/7, 1983.

I. Identification

A. Purchaser:----------

B. Unit identification (Only one unit may be covered in each report.)

1.Reactor/Facility/Name:_____

2.Location:_____

3.Type:_____

4.Capacity:_____

5. Date of Commencement of Operations:_____

6. NRC License No.:_____

II. Fee Calculation

A. Discharged nuclear fuel

1. Burnup \1\ (MWDT/MTU)	0-5,000	5,000-10,000	10,000-20,000	20,000 up
2. Initial loading (KgU) (with indicated burnup).....	.....	.....	.....	.....
3. Fee rate ($/KgU).....	80.00	142.00	162.00	184.00
4. Fee ($).....	.....	.....	.....	.....
5. Total fee (4).....				

B. Nuclear fuel in the reactor core as of midnight of 6/7 April 1983.

Assembly identification	Initial loading (KgU)	Burnup \1\ as of midnight 6/7 April 1983 (MWDT/MTU)	Fee
1.....	.....	.....	.....
2.....	.....	.....	.....
3.....	.....	.....	.....
4.....	.....	.....	.....
5.....	.....	.....	.....
6.....	.....	.....	.....
7.....	.....	.....	.....
8.....	.....	.....	.....
9.....	.....	.....	.....
10.....	.....	.....	.....
11.....	.....	.....	.....
12.....	.....	.....	.....
13.....	.....	.....	.....
14.....	.....	.....	.....
15.....	.....	.....	.....
16.....	.....	.....	.....
17.....	.....	.....	.....
18.....	.....	.....	.....
19.....	.....	.....	.....
20.....	.....	.....	.....
21.....	.....	.....	.....
22.....	.....	.....	.....
23.....	.....	.....	.....
24.....	.....	.....	.....
25.....	.....	.....	.....

\1\ Please provide (as an attachment) a clear reference to the methodology used to derive the burnup figures (computer codes, etc.) and a clear reference to all data used in the derivation of those figures.

C. Total fee.

(Approved by the Office of Management and Budget under control number 1091-0260)

[48 FR 16599, Apr. 18, 1983; 48 FR 23160, May 24, 1983, as amended at 52 FR 35359, Sept. 18, 1987; 56 FR 67659, Dec. 31, 1991]

STATE OF MICHIGAN and the MICHIGAN PUBLIC SERVICE COMMISSION

Frank J. Kelley, Attorney General
Thomas L. Casey, Solicitor General
Henry J. Boynton, Assistant Attorney General
Larry G. Watterworth, Assistant Attorney General
Public Service Division
6545 Mercantile Way, Suite 15
Lansing, MI 48911
Telephone: (517) 334-7650
Fax: (517) 334-7655

STATE OF CONNECTICUT AND THE CONNECTICUT DEPARTMENT OF PUBLIC UTILITY CONTROL

Richard Blumenthal, Attorney General
Robert S. Golden, Jr., Assistant Attorney General
10 Franklin Square
New Britain, CT 06051
Telephone: (860) 827-2683
Fax: (860) 827-2613

FLORIDA PUBLIC SERVICE COMMISSION

Robert D. VanDiver, General Counsel
Richard C. Bellak, Associate General Counsel
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850
Telephone: (850) 413-6248
Fax: (850) 413-7180

COMMONWEALTH OF MASSACHUSETTS

Scott Harshbarger, Attorney General
Leslie Greer, Assistant Attorney General
Trial Division
200 Portland Street
Boston, MA 02114
Telephone: (617) 727-2200, ext 3300
Fax: (617) 727-3076

SOUTH DAKOTA PUBLIC UTILITIES COMMISSION

Rolayne Ailts Wiest, Special Assistant Attorney General
500 East Capitol Avenue
State Capitol Building
Pierre, SD 57501-5070
Telephone: (605) 773-3201
Fax: (605) 773-3809

STATE OF DELAWARE

M. Jane Brady, Attorney General
Michael F. Foster, State Solicitor
Charles F. Walker, Deputy Attorney General
Kevin P. Maloney, Deputy Attorney General
Department of Justice
820 N. French Street
Wilmington, DE 19801
Telephone: (302) 577-8400
Fax: (302) 577-6630

STATE OF KANSAS

Carla J. Stovall, Attorney General
John W. Campbell, Deputy Attorney General
Kansas Judicial Center
Second Floor
Topeka, KS 66612-1597
Telephone: (913) 296-2215
Fax: (913) 296-6296

IOWA UTILITIES BOARD

Diane Munns, General Counsel
Iowa Utilities Board
Department of Commerce
350 Maple Street
Des Moines, IA 50319
Telephone: (515) 281-3448
Fax: (515) 242-5081

STATE OF VERMONT and THE VERMONT PUBLIC SERVICE BOARD

William H. Sorrell, Attorney General
J. Wallace Malley, Jr., Deputy Attorney General
Mary McCabe, Assistant Attorney General
Office of the Attorney General
109 State Street
Montpelier, VT 05609-1001
Telephone: (802) 828-3171
Fax: (802) 828-2154

PENNSYLVANIA PUBLIC UTILITY COMMISSION

Lawrence F. Barth, Assistant Counsel
Bodran R. Pankiw, Chief Counsel
Room 203, North Office Building
P.O. Box 3265
Harrisburg, PA 17105-3265
Telephone: (717) 772-8579
Fax: (717) 783-3458

COMMONWEALTH OF KENTUCKY

A. B. Chandler, III, Attorney General
James J. Grawe, Assistant Attorney General
State Capitol
700 Capitol Avenue
Frankfort, KY 40602-2000
Telephone: (502) 696-5300
Fax: (502) 564-2894

STATE OF MARYLAND

J. Joseph Curran, Jr., Attorney General
M. Brent Hare, Assistant Attorney General
Power Plant Research Program
580 Taylor Avenue
Annapolis, MD 21401
Telephone: (410) 860-8666 or 974-3751
Fax: (410) 260-8670

STATE OF NEW JERSEY BOARD OF PUBLIC UTILITIES

Peter Verniero, Attorney General
Caroline Vachier, Deputy Attorney General
Elise Goldblat, Deputy Attorney General
Division of Law
124 Halsey Street 5th Floor
P.O. Box 45029
Newark, NJ 07101
Telephone: (973) 648-4866
Fax: (973) 648-7156

OFFICE OF CONSUMER ADVOCATE STATE OF NEW HAMPSHIRE

James R. Anderson, Assistant Consumer Advocate
117 Manchester St.
Concord, NH 03301
Telephone: (603) 271-1172
Fax: (603) 271-1177

GEORGIA PUBLIC SERVICE COMMISSION

Thurbert E. Baker, Attorney General
Alan Gantzhorn, Senior Assistant Attorney General
40 Capitol Square, S.W.
Atlanta, GA 30334-1300
Telephone: (404) 656-7542
Fax: (404) 651-6341

STATE OF NEW HAMPSHIRE

Wynn E. Arnold, Assistant Attorney General
Civil Bureau
33 Capitol Street
Concord, NH 03301-6397
Telephone: (603) 271-3658
Fax: (603) 271-2110

STATE OF IOWA

Ben Stead
Iowa Department of Justice
Office of Consumer Advocate
4th Floor, Lucas State Office Building
Des Moines, IA 50319
Telephone: (515) 281-5984
Fax: (515) 242-6564

COMMONWEALTH OF VIRGINIA

Carl Josephson, Assistant Attorney General
900 East Main Street
Richmond, VA 23219
Telephone: (804) 786-2452
Fax: (804) 786-0034

PUBLIC SERVICE COMMISSION OF SOUTH CAROLINA

F. David Butler, General Counsel
Florence P. Belser, Staff Counsel
P.O. Drawer 11649
Columbia, SC 29211
Telephone: (803) 737-5117

Fax: (803) 737-5246

STATE OF MAINE

Andrew Ketterer, Attorney General
Paul Stern, Assistant Attorney General
6 State House Station
Augusta, ME 04333-0006
Telephone: (207) 626-8800
Fax: (207) 287-3145

STATE OF ILLINOIS

James E. Ryan, Attorney General
Carole R. Doris, Chief, Department of Public Advocacy
100 West Randolph Street, 12th Floor
Chicago, IL 60601
Telephone: (312) 814-3000
Fax: (312) 814-3806

VIRGINIA STATE CORPORATION COMMISSION

William H. Chambliss, Deputy General Counsel
C. Meade Browder, Jr., Attorney
Virginia State Corporation Commission
P.O. Box 1197
Richmond, VA 23218
Telephone: (804) 371-9671
Fax: (804) 371-9240

PUBLIC SYSTEMS GROUP

Gary J. Newell
Frances E. Francis
SPIEGEL & McDIARMID
Suite 1100
1350 New York Avenue, N.W.
Washington, D.C. 20005-4798
Telephone: (202) 879-4000
Fax: (202) 879-4001 or 879-4081

LOUISIANA PUBLIC SERVICE COMMISSION

Michael R. Fontham
Noel J. Darce
STONE, PIGMAN, WALTHER, WITTMANN & HUTCHINSON
546 Carondelet Street
New Orleans, LA70130-3588
Telephone: (504) 581-3200
Fax: (504) 581-3361

Brian Eddington
General Counsel
Louisiana Public Service Commission
P.O. Box 91154
Baton Rouge, LA 70821-9154

STATE OF MINNESOTA
MINNESOTA DEPARTMENT OF PUBLIC SERVICE
MINNESOTA PUBLIC UTILITIES COMMISSION

Hubert H. Humphrey III, Attorney General

Gregory P. Huwe, Assistant Attorney General
525 Park St., Suite 200
St. Paul, MN 55103-2106

Don L. Keskey, By Special Appointment
225 South Troy St, Suite 230
Royal Oak, MI 48067
Telephone: (248) 584-0900
Fax: (248) 584-0975

STATE OF FLORIDA

Michael A. Gross, Assistant Attorney General
Special Projects Section
Office of the Attorney General
PL-01 The Capitol
Tallahassee, FL 32399-1050
Telephone: (850) 414-3300
Fax: (850) 488-6589

ARKANSAS PUBLIC SERVICE COMMISSION

Mary W. Cochran, General Counsel
1000 Center Street
P.O. Box 1000
Little Rock, AR 72203-0400
Telephone: (501) 682-5846
Fax: (501) 682-5731

MARYLAND PUBLIC SERVICE COMMISSION

Bryan G. Moorhouse, General Counsel
Susan S. Miller, Assistant General Counsel
Maryland Public Service Commission
6 St. Paul Centre
Baltimore, MD 21202
Telephone: (410) 767-8036
Fax: (410) 333-6495

MISSOURI PUBLIC SERVICE COMMISSION

Roger W. Steiner, Assistant General Counsel
P.O. Box 360
Jefferson City, MO 65102
Telephone: (573) 751-7434
Fax: (573) 751-9285

PUBLIC SERVICE COMMISSION OF WISCONSIN

Edward S. Marion, Chief Counsel
David Ludwig, Attorney
Electric Division
610 N. Whitney Way
P.O. Box 7854
Madison, WI 53707-7854
Telephone: (608) 266-5621
Fax: (608) 266-3957

KANSAS CORPORATION COMMISSION

Glen W. Froelich, Assistant General Counsel
Kansas Corporation Commission
1500 SW Arrowhead Road
Topeka, KS 66604-4027
Telephone: (785) 271-3119
Fax: (785) 271-3167

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Peter Arth, Jr.
Harvey Y. Morris
505 Van Ness Avenue
San Francisco, CA 94102
Telephone: (415) 703-1086
Fax: (415) 703-2262

NEW YORK STATE PUBLIC SERVICE COMMISSION

Lawrence G. Malone, Solicitor
Cheryl L. Callahan
Three Empire State Plaza, 17th Floor
Albany, NY 12243-1350
Telephone: (518) 474-6513
Fax: (518) 473-7081

ALABAMA PUBLIC SERVICE COMMISSION

Lester M. Bridgeman
MILLER, HAMILTON, SNIDER & ODOM
254 State Street
P.O. Box 46
Mobile, AL 36601-0046
Telephone: (334) 432-1414
Fax: (334) 433-4106

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

Jeffrey B. Pine, Attorney General
Paul J. Roberti, Special Assistant Attorney General
Alan M. Shoer, Special Assistant Attorney General
150 South Main Street
Providence, RI 02903
Telephone: (401) 274-4400, ext 2231
Fax: (401) 273-4270

STATE OF ARKANSAS

Winston Bryant, Attorney General
Shirley E. Guntharp, Deputy Attorney General
Charles L. Moulton, Assistant Attorney General
323 Center Street, Suite 200
Little Rock, AR 72201-2610
Telephone: (501) 682-2007
Fax: (501) 682-8084

MISSISSIPPI PUBLIC SERVICE COMMISSION

George M. Fleming
Patricia L. Transham
Public Utilities Staff
Walter Sillers State Office Building
P.O. Box 1174
Jackson, MS 39215-1174
Telephone: (601) 961-5490
Fax: (601) 961-5804

STATE OF NEBRASKA

Don Stenberg, Attorney General
L. Steven Grasz, Deputy Attorney General
Linda L. Willard, Assistant Attorney General
2115 State Capitol
Lincoln, NE 68509-8920
Telephone: (402) 471-2757
Fax: (402) 471-3297

STATE OF MISSISSIPPI

Mike Moore, Attorney General
Frank Spencer, Special Assistant Attorney General
P.O. Box 22947
Jackson, MS 39225-2947
Telephone: (601) 359-4210
Fax: (601) 359-4273

NORTH DAKOTA PUBLIC SERVICE COMMISSION

Charles E. Johnson, Special Assistant Attorney General
William W. Binek, Special Assistant Attorney General
State Capitol
Bismarck, ND 58505
Telephone: (701) 328-4078
Fax: (701) 328-2410

STATE OF INDIANA

Daniel B. Dovenbarger, Deputy Attorney General
402 W. Washington Street
Indianapolis, IN 46204
Telephone: (317) 233-6313
Fax: (317) 232-7979

NORTH CAROLINA UTILITIES COMMISSION

Sammy R. Kirby, Deputy General Counsel
P.O. Box 29510
Raleigh, NC 27626-0510
Telephone: (919) 733-0834
Fax: (919) 733-7300

PUBLIC UTILITIES COMMISSION OF OHIO

Betty D. Montgomery, Attorney General
Jeffrey S. Sutton, State Solicitor
Duane W. Luckey, Assistant Attorney General
Steven T. Nourse, Assistant Attorney General
Public Utilities Section
180 East Broad Street
Columbus, OH 43215-3793
Telephone: (614) 644-8762
Fax: (614) 644-8764

ILLINOIS COMMERCE COMMISSION

Myra L. Karegianes, General Counsel
James E. Weging, Special Assistant Attorney General
Illinois Commerce Commission
160 N. LaSalle Street
Suite C-800
Chicago, IL 60601
Telephone: (312) 793-2877
Fax: (312) 793-1556

NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS

Charles D. Gray, General Counsel
James Bradford Ramsay, Assistant General Counsel
National Association of Regulatory Utility Commissioners
Old Post Office Pavilion, Suite 603
1100 Pennsylvania Ave, N.W.
P.O. Box 684
Washington, D.C. 20044-0684
Telephone: (202) 898-2208
Fax: (202) 898-2213

ARIZONA CORPORATION COMMISSION

Eric A. Eisen
Eisen Law Office
10028 Woodhill Road
Bethesda, MD 20817
Telephone: (301) 469-8590
Fax: (301) 469-8120

Paul Bullis, Chief Counsel
Legal Division
Arizona Corporation Commission
1200 West Washington
Phoenix, AZ 85007
Telephone: (602) 542-3402
Fax: (602) 542-4870

Supreme Court, U.S.
FILED
OCT 1 1998
OFFICE OF THE CLERK

(2)

No. 98-225

In the Supreme Court of the United States

OCTOBER TERM, 1997

STATE OF MICHIGAN, ET AL., PETITIONERS

v.

UNITED STATES DEPARTMENT OF ENERGY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record

LOIS J. SCHIFFER
Assistant Attorney General

JOHN A. BRYSON
Attorney

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

23 pp

QUESTIONS PRESENTED

1. Whether the court of appeals correctly declined to order the Department of Energy (DOE) to begin to accept for disposal spent nuclear fuel (SNF) generated by electric utilities.

2. Whether the petitioners in this case, who are States and state public utility commissions rather than owners or generators of SNF, have standing to seek an order directing DOE to begin accepting SNF for disposal.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutory provisions involved	2
Statement	2
Argument	11
Conclusion	18

TABLE OF AUTHORITIES

Cases:

Alfred L. Snapp & Son, Inc. v. *Puerto Rico*, 458 U.S. 592 (1982)	17
Burton v. *Central Interstate Low-Level Radioactive Waste Compact Comm'n*, 23 F.3d 208 (8th Cir.), cert. denied, 513 U.S. 951 (1994)	17
Indiana Michigan Power Co. v. *Department of Energy*, 88 F.3d 1272 (D.C. Cir.1996)	5, 7
Maryland People's Counsel v. *FERC*, 760 F.2d 318 (D.C. Cir. 1985)	17
Massachusetts v. *Mellon*, 262 U.S. 447 (1923)	17
Megapulse, Inc. v. *Lewis*, 672 F.2d 959 (D.C. Cir. 1982)	14
Northern States Power Co. v. *United States Dep't of Energy*, 128 F.3d 754 (D.C. Cir. 1997)	8
Pennsylvania v. *Kleppe*, 533 F.2d 668 (D.C. Cir. 1976)	17
Sharp v. *Weinberger*, 798 F.2d 1521 (D.C. Cir. 1986)	14
Transohio Savings Bank v. *Director, OTS*, 967 F.2d 598 (D.C. Cir. 1992)	14

Cases—Continued:	Page
United States Dep't of Interior v. *FERC*, 952 F.2d 538 (D.C. Cir. 1992)	17
Warth v. *Seldin*, 422 U.S. 490 (1975)	16
Statutes and regulation:	
Atomic Energy Act of 1954, 42 U.S.C. 2011 *et seq.*	15
Nuclear Waste Policy Act of 1982, 42 U.S.C. 10101 *et seq.*	2
§ 111(a)(4), 42 U.S.C. 10131(a)(4)	2
§§ 113-115, 42 U.S.C. 10133-10135	2
§ 114, 42 U.S.C. 10134	5
§ 114(a), 42 U.S.C. 10134(a)	16
§ 115, 42 U.S.C. 10135	5
§ 116, 42 U.S.C. 10136	5
§ 119, 42 U.S.C. 10139	2, 6
§ 119(a)(1)(A), 42 U.S.C. 10139(a)(1)(A)	6, 14
§ 119(a)(1)(B), 42 U.S.C. 10139(a)(1)(B)	12-13
§ 119(c), 42 U.S.C. 10139(c)	6, 14
§ 121, 42 U.S.C. 10141	5
§ 145(b), 42 U.S.C. 10165(b)	5, 16
§ 148(d), 42 U.S.C. 10168(d)	16
§ 302, 42 U.S.C. 10222	2
§ 302(a), 42 U.S.C. 10222(a)	12
§ 302(a)(1), 42 U.S.C. 10222(a)(1)	9
§ 302(a)(2), 42 U.S.C. 10222(a)(2)	2
§ 302(a)(3), 42 U.S.C. 10222(a)(3)	2, 3
§ 302(a)(5), 42 U.S.C. 10222(a)(5)	3, 4, 12, 13, 16
§ 302(a)(5)(B), 42 U.S.C. 10222(a)(5)(B)	18
§ 302(a)(6), 42 U.S.C. 10222(a)(6)	13
§ 302(b), 42 U.S.C. 10222(b)	3
§ 302(c), 42 U.S.C. 10222(c)	3
Tucker Act, 28 U.S.C. 1491 (1994 & Supp. II 1996)	9

Statutes and regulations—Continued: Page

Standard Contract for Disposal of Spent Nuclear Fuel and/or High-Level Radioactive Waste, 10 C.F.R. 961.11 4
Art. II 4, 11
Art. IX 4, 5, 6, 7, 8, 11
Art. IX.B 9
Art. XVI 7

Miscellaneous:

48 Fed. Reg. (1983):
p. 5458 4
p. 16,590 4
59 Fed. Reg. (1994):
p. 27,007 6
p. 27,008 6
60 Fed. Reg. (1995):
p. 27,793 6
pp. 21,794-21,795 6
p. 21,797 6

In the Supreme Court of the United States

OCTOBER TERM, 1997

No. 98-225

STATE OF MICHIGAN, ET AL., PETITIONERS

v.

UNITED STATES DEPARTMENT OF ENERGY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 128 F.3d 754. The court of appeals' order denying rehearing and denying motions to enforce the mandate (Pet. App. 17a-21a) is unreported. The court of appeals' prior opinion in *Indiana Michigan Power Co.* v. *Department of Energy* (Pet. App. 27a-37a) is reported at 88 F.3d 1272.

JURISDICTION

The judgment of the court of appeals was entered on November 14, 1997. Petitions for rehearing were denied on May 5, 1998. Pet. App. 17a-21a. The petition for a writ of certiorari was filed on August 3, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Sections 119 and 302 of the Nuclear Waste Policy Act of 1982, 42 U.S.C. 10139, 10222, are set forth at Pet. App. 57a-67a.

STATEMENT

1. The Nuclear Waste Policy Act of 1982 (NWPA or Act), 42 U.S.C. 10101 *et seq.*, establishes a program for disposing of high-level radioactive waste and spent nuclear fuel (SNF). The major long-term objective of the Act is the siting, construction, and operation of a deep mined geologic repository that will safely isolate SNF from the human environment for at least 10,000 years. The Department of Energy (DOE) is charged with evaluating a site at Yucca Mountain in Nevada, and if the site is found suitable for such a repository and approved in accordance with the statutory procedures, obtaining a license from the Nuclear Regulatory Commission and then constructing and operating the facility. 42 U.S.C. 10133-10135.

The program is financed in large measure by fees paid by past and present generators of nuclear power, primarily electric utilities. Congress determined that "while the Federal Government has the responsibility to provide for the permanent disposal of high-level radioactive waste and * * * spent nuclear fuel * * *, the costs of such disposal should be the responsibility of the generators and owners of such waste and spent fuel." 42 U.S.C. 10131(a)(4). Under Section 302 of the NWPA, those parties were assessed a "1 time" fee based on the amount of power generated prior to the effective date of the NWPA, and are assessed an ongoing fee based on the amount of power generated thereafter. 42 U.S.C. 10222(a)(2) and (3). That money is deposited into a Treasury account called the Nuclear

Waste Fund, from which Congress makes annual appropriations to fund the program. 42 U.S.C. 10222(c).[1]

2. The NWPA requires each generator owning spent fuel to have a contract with DOE for the disposal of the fuel. 42 U.S.C. 10222(b). In addition, Section 302(a)(5) provides:

> Contracts entered into under this section shall provide that—
>
> (A) following commencement of operation of a repository, the Secretary shall take title to the high-level radioactive waste or spent nuclear fuel involved as expeditiously as practicable upon the request of the generator or owner of such waste or spent fuel; and
>
> (B) in return for the payment of fees established by this section, the Secretary, beginning not later than January 31, 1998, will dispose of the high-level radioactive waste or spent nuclear fuel involved as provided in this subchapter.

42 U.S.C. 10222(a)(5).

DOE established the terms of the Standard Contract for Disposal of Spent Nuclear Fuel and/or High-Level Radioactive Waste (Standard Contract) by rulemaking.

---

[1] The Department of Energy informs us that over the last 15 years, utilities have paid approximately $9 billion into the fund. Congress has appropriated, and DOE has spent, some $4.8 billion. Utilities are currently paying into the fund at the annual rate of some $600 million. Once a utility ceases generating nuclear power, however, it is no longer required to pay the ongoing fee. And once the full amount due has been paid, the utility has no further financial obligation to the federal government for the disposal of its fuel. 42 U.S.C. 10222(a)(3).

See 48 Fed. Reg. 5458 (1983) (proposed Standard Contract); 48 Fed. Reg. 16,590 (1983) (final Standard Contract). The Standard Contract is published at 10 C.F.R. 961.11. Each utility that generates SNF has signed an individual contract containing all the terms and conditions of the Standard Contract. In accordance with 42 U.S.C. 10222(a)(5), Article II of the Standard Contract states that "[t]he services to be provided by DOE under this contract shall begin, after commencement of facility operations, not later than January 31, 1998 and shall continue until such time as all SNF * * * has been disposed of." 10 C.F.R. 961.11.

Article IX of the Standard Contract addresses potential delays in contract performance. Article IX states:

> A. *Unavoidable Delays by Purchaser or DOE*
>
> Neither the Government nor the Purchaser shall be liable under this contract for damages caused by failure to perform its obligations hereunder, if such failure arises out of causes beyond the control and without the fault or negligence of the party failing to perform. In the event circumstances beyond the reasonable control of the Purchaser or DOE—such as acts of God, or of the public enemy, acts of Government in either its sovereign or contractual capacity, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes and unusually severe weather—cause delay in scheduled delivery, acceptance or transport of SNF * * *, the party experiencing the delay will notify the other party as soon as possible after such delay is ascertained and the parties will readjust their schedules, as appropriate, to accommodate such delay.

B. *Avoidable Delays by Purchaser or DOE*

> In the event of any delay in the delivery, acceptance or transport of SNF * * * to or by DOE caused by circumstances within the reasonable control of either the Purchaser or DOE or their respective contractors or suppliers, the charges and schedules specified by this contract will be equitably adjusted to reflect any estimated additional costs incurred by the party not responsible for or contributing to the delay.

10 C.F.R. 961.11.

3. When the NWPA was enacted, "Congress anticipated the existence of a repository by 1998." *Indiana Michigan Power Co.* v. *Department of Energy*, 88 F.3d 1272, 1277 (D.C. Cir. 1996) (Pet. App. 36a). By 1993, however, it had become apparent both that DOE would not have a repository in operation by 1998, and that an interim storage facility would not be available by that time.[2] In response to inquiries about DOE's plans and its view of the government's obligations under the statute, DOE published in the *Federal Register* a re-

---

[2] DOE currently projects that its scientific and technical evaluation of the Yucca Mountain site (a process known as site characterization) will be completed in 2001. If Yucca Mountain is found suitable for development of a repository, DOE expects to recommend approval of the site to the President in 2001. DOE further expects to be able to begin receipt of SNF at the Yucca Mountain site in 2010 if the approval is sustained (see 42 U.S.C. 10134, 10135, 10136) and if required Nuclear Regulatory Commission (NRC) licenses are issued (see 42 U.S.C. 10134, 10141). Under the NWPA, a site for a Monitored Retrievable Storage facility (*i.e.*, an interim storage facility) cannot be selected until DOE recommends a repository site to the President. See 42 U.S.C. 10165(b).

quest for comment on a preliminary interpretation of Section 302(a)(5) of the NWPA. 59 Fed. Reg. 27,007 (1994). DOE's preliminary view was that the January 31, 1998, deadline specified in that Section was implicitly conditioned on the availability of a repository or other facility licensed under the NWPA. *Ibid.*; see *id.* at 27,008. After consideration of comments from the public, DOE concluded, in accordance with the preliminary views expressed in the earlier *Federal Register* notice, that the NWPA "does not impose a statutory obligation on DOE to begin nuclear waste disposal in 1998 in the absence of a disposal or interim storage facility constructed under the Act." 60 Fed. Reg. 21,793, 21,794-21,795 (1995). DOE also stated that if the obligation to accept SNF no later than January 31, 1998, was determined to be unconditional, as the utilities contended, the Delays Clause (Art. IX, 10 C.F.R. 961.11; see pp. 4-5, *supra*) of the contract would supply the appropriate remedy. *Id.* at 21,797.

Petitioners in this case are States, state utility commissions, and a national association of state regulatory commissions. Pursuant to Section 119 of the NWPA, 42 U.S.C. 10139, they filed a petition for review in the United States Court of Appeals for the District of Columbia Circuit challenging DOE's view of its obligations under the Act.[3] A number of utilities also filed petitions for review raising similar claims. The peti-

---

[3] Section 119 states that "the United States courts of appeals shall have original and exclusive jurisdiction over any civil action * * * for review of any final decision or action of the Secretary." 42 U.S.C. 10139(a)(1)(A). Section 119 further provides that "[a] civil action for judicial review described under subsection (a)(1) of this section may be brought not later than the 180th day after the date of the decision or action or failure to act involved." 42 U.S.C. 10139(c).

tions for review asked the court to set aside DOE's interpretation, to permit the utilities to escrow their fee payments after January 31, 1998, and to order DOE to develop a plan for beginning disposal services as soon as possible after that date. Pet. App. 4a-6a.

The court of appeals vacated DOE's interpretation. *Indiana Michigan*, *supra* (Pet. App. 27a-37a). The court held that the NWPA "creates an obligation in DOE, reciprocal to the utilities' obligation to pay, to start disposing of the SNF no later than January 31, 1998." *Id.* at 37a. The court stated that the absence of any suitable facility for the disposal of nuclear waste "simply affects the remedy we can provide." *Id.* at 36a. The court concluded, however, that it was "premature to determine the appropriate remedy, particularly as to the interaction between Article XI and Article XVI of the Standard Contracts, as DOE has not yet defaulted upon either its statutory or contractual obligation. We therefore will remand this matter for further proceedings consistent with this opinion." *Id.* at 37a.

4. After the court of appeals issued its decision in *Indiana Michigan*, DOE issued the required notice of a delay under the Delays Clause (Art. IX, 10 C.F.R. 961.11) of the Standard Contract, and gave contract holders an opportunity to submit their views on how that delay should be addressed. See Pet. App. 5a-6a. Following review of the comments, DOE concluded that the Disputes Clause (Art. XVI, 10 C.F.R. 961.11) of the contract governed resolution of whether the delay was "[u]navoidable" or "[a]voidable." DOE also made a preliminary determination that the delay was unavoidable (Pet. App. 6a), and it provided 60 days for contract holders to make submissions supporting their

contrary view.[4] See Exh. 6, Exhibits to Respondents' Response to Petitions for a Writ of Mandamus.

Petitioners, as well as the utility companies, had in the meantime filed in the court of appeals petitions for a writ of mandamus alleging that DOE had failed to comply with the Court's mandate in *Indiana Michigan*. Pet. App. 6a. They renewed their request for an order requiring DOE to begin disposal services on January 31, 1998, and for a declaration that the utilities could escrow the payment of their fees if DOE failed to perform its obligation by that date. *Ibid.*

5. The court of appeals granted limited mandamus relief. *Northern States Power Co.* v. *United States Dep't of Energy*, 128 F.3d 754 (D.C. Cir. 1997) (Pet. App. 1a-14a). The court declined to issue a writ of mandamus directing DOE to begin accepting SNF by January 31, 1998, explaining that the utilities had a potentially adequate remedy under the Delays Clause (Art. IX, 10 C.F.R. 961.11) of the Standard Contract. Pet. App. 9a. The court concluded, however, that "DOE's current approach toward contractual remedies"—*i.e.*, the Department's preliminary determination that the expected delay in its acceptance of SNF would be "[u]navoidable" within the meaning of Article IX—was inconsistent with the *Indiana Michigan*

---

[4] DOE's preliminary determination concluded that the delay was unavoidable because the unprecedented process of siting and developing a repository had been beset by technical problems, delays necessary to satisfy a broad range of regulatory requirements, legislative amendments that effectively blocked early establishment of an interim storage facility, budgetary restrictions, litigation delays, and the legal obligation to consult a broad range of interested parties, including States, Indian tribes, and private interest groups. See Exh. 6, Exhibits to Respondents' Response to Petitions for a Writ of Mandamus.

mandate. Pet. App. 11a. The effect of the court's ruling was to require the utilities to exhaust their remedies under Article IX.B of the Standard Contract, which provides for an equitable adjustment of fees in cases involving "[a]voidable [d]elays."

6. DOE filed a petition for rehearing, arguing that the court of appeals lacked jurisdiction to determine the applicability of the "[u]navoidable [d]elays" provision of the Standard Contract. See Pet. App. 20a. DOE's rehearing petition explained that questions concerning the construction and administration of the Standard Contract are entrusted to the Court of Federal Claims, which exercises exclusive jurisdiction under the Tucker Act, 28 U.S.C. 1491 (1994 & Supp. II 1996), over actions founded on a contract with the United States. One of the utilities, Yankee Atomic Company (Yankee), also filed a rehearing petition. The petitioners in the instant case, as well as the remaining utilities, filed motions to enforce or expand the mandate. Petitioners contended that the equitable adjustment of fees was not an appropriate remedy since under the statutory requirement that DOE collect fees sufficient to ensure full program cost recovery, equitable adjustments would simply redistribute the burden of the program's costs from some utilities to other utilities. See 42 U.S.C. 10222(a)(1) (contracts shall provide for payment of fees sufficient to offset the costs of the program). They requested an order barring DOE from using fee collections to pay any costs or damages due to the delay, and they renewed their request for specific relief that would order DOE to develop a plan for disposing of their spent fuel. Pet. App. 17a-21a.

On May 5, 1998, the court denied the petitions for rehearing and the motions to enforce the mandate. Pet. App. 17a-21a. In rejecting Yankee's request for a

move-fuel order (*i.e.*, an order requiring DOE to accept SNF for disposal), the court explained (*id.* at 20a) that

> enforcement of our mandate does not extend to requiring the DOE to perform under the Standard Contract. While the statute requires the DOE to include an unconditional obligation in the Standard Contract, it does not itself require performance. Breach by the DOE does not violate a statutory duty; thus, our jurisdiction to hear allegations of failure to take an action required under the NWPA, see 42 U.S.C. § 10139(a)(1)(B), does not provide a basis for a move-fuel order.

The court also rejected DOE's contention that the court's grant of mandamus relief impermissibly intruded on the jurisdiction of the Court of Federal Claims, stating (Pet. App. 20a-21a):

> The DOE * * * suggest[s] that this Court has erroneously designated itself as the proper forum for adjudication of disputes arising under the Standard Contract. As the above should make clear, we did not; we merely prohibited the DOE from implementing an interpretation that would place it in violation of its duty under the NWPA to assume an unconditional obligation to begin disposal by January 31, 1998. The statutory duty to include an unconditional obligation in the contract is independent of any rights under the contract. The Tucker Act does not prevent us from exercising jurisdiction over an action to enforce compliance with the NWPA.

7. To date, only one party to the Standard Contract has filed with DOE a request for equitable adjustment of fees under the "[a]voidable [d]elays" provision.

Instead, eleven utilities have filed suit in the Court of Federal Claims, seeking damages ranging from $70 million to $1.5 billion. Other utilities have again sought relief in the D.C. Circuit.

After the petition in the instant case was filed, the government filed its own petition for a writ of certiorari. That petition has been docketed as *United States Dep't of Energy, et al.* v. *Northern States Power Company, et al.*, No. 98-384, and is currently pending before the Court. The government's petition argues that by barring DOE from treating the delay in contract performance as "[u]navoidable" within the meaning of Article IX (10 C.F.R. 961.11) of the Standard Contract, the court of appeals has impermissibly intruded upon the jurisdiction of the Court of Federal Claims, which is vested with exclusive authority to adjudicate contract claims against the United States.

ARGUMENT

Petitioners contend that the court of appeals erred in refusing to direct DOE to commence accepting SNF for disposal. That claim is without merit. As the court of appeals ultimately recognized, DOE's obligation under the NWPA is to enter into contracts providing that it will begin to accept SNF for disposal by January 31, 1998. DOE fulfilled that obligation in promulgating the Standard Contract. See Art. II, 10 C.F.R. 961.11. Any remedy that may be available for DOE's failure to perform arises under the contract, not under the NWPA. The court of appeals lacked authority to direct DOE to commence disposal services, both because the Court of Federal Claims has exclusive jurisdiction over contract claims against the United States, and because specific performance is not an available remedy in such a suit.

Even if the NWPA did require DOE to commence acceptance of SNF by January 31, 1998, petitioners would lack standing to enforce the deadline. Petitioners do not own or generate SNF. States and public utility commissions cannot assert *parens patriae* standing against the federal government, and petitioners' role as consumers of electric power would be insufficient to accord them standing. Both because petitioners' claim lacks merit, and because petitioners are not the proper parties to assert it, the petition for a writ of certiorari should be denied.

1. a. Petitioners' claim is founded on Section 302(a) of the NWPA, 42 U.S.C. 10222(a). That Section states in relevant part:

> (5) Contracts entered into under this section shall provide that—
>
> * * * * *
>
> (B) in return for the payment of fees established by this section, the Secretary, beginning not later than January 31, 1998, will dispose of the high-level radioactive waste or spent nuclear fuel involved as provided in this subchapter.

42 U.S.C. 10222(a)(5). By its plain terms, Section 302(a)(5) requires only that contracts between DOE and generators of SNF must provide for disposal to commence no later than January 31, 1998. The court of appeals correctly recognized that "[w]hile the statute requires the DOE to include an * * * obligation in the Standard Contract, it does not itself require performance. Breach by the DOE does not violate a statutory duty; thus, our jurisdiction to hear allegations of failure to take an action required under the NWPA, see 42

U.S.C. § 10139(a)(1)(B), does not provide a basis for a move-fuel order." Pet. App. 20a.

Petitioners make virtually no effort to reconcile their position with the plain terms of Section 10222(a)(5). Rather, they argue (see Pet. 12-17) that the court of appeals' order denying the petitions for rehearing and motions to enforce the mandate (Pet. App. 17a-21a) is inconsistent with language in the court's prior opinions both in this case and in *Indiana Michigan*. We agree with petitioners that some language in those opinions suggests that DOE's duty to commence SNF disposal by January 31, 1998, is statutory rather than contractual in nature. The court of appeals ultimately recognized, however, that DOE's obligation under the NWPA was simply to include specified provisions in the Standard Contract. Any inconsistency between that holding and some of the reasoning in prior opinions issued by the same panel of the same court of appeals does not warrant review by this Court.

Petitioners also assert that a specific directive to commence acceptance of SNF is necessary in order to effectuate the congressional policies underlying the NWPA. See Pet. 7, 8-10, 16-18, 20, 22. In enacting the NWPA, however, Congress chose not to impose upon DOE a freestanding statutory obligation to accept SNF by a particular date. Rather, Congress directed DOE to enter into contracts containing specified provisions, see 42 U.S.C. 10222(a)(5), and expressly authorized DOE to establish additional contractual terms, 42 U.S.C. 10222(a)(6). In choosing that means of achieving the statutory objectives, Congress must be presumed to have intended that disputes regarding the precise nature of the parties' obligations, and the remedies for any breach thereof, would be resolved in the manner appropriate for contract claims.

b. For the reasons stated above, DOE's obligation to accept SNF by January 31, 1998, was contractual rather than statutory in nature. The court of appeals could not have directed DOE to commence acceptance of SNF as a remedy for DOE's failure to perform its obligations under the Standard Contract. It is well established that "[t]he sole remedy for an alleged breach of contract by the federal government is a claim for money damages, either in the United States Claims Court under the Tucker Act, 28 U.S.C. § 1491(a)(1) (1982), or, if damages of no more than $10,000 are sought, in district court under the Little Tucker Act, 28 U.S.C. § 1346(a)(2) (1982)." *Sharp* v. *Weinberger*, 798 F.2d 1521, 1523 (D.C. Cir. 1986) (Scalia, J.). Accord, *e.g.*, *Transohio Savings Bank* v. *Director, OTS*, 967 F.2d 598, 609-610 (D.C. Cir. 1992); *Megapulse, Inc.* v. *Lewis*, 672 F.2d 959, 967 (D.C. Cir. 1982). The court of appeals' authority to review "any final decision or action of the Secretary" of Energy under the NWPA, 42 U.S.C. 10139(a)(1)(A), therefore does not extend to a claim for breach of contract. Moreover, specific performance is not an available remedy in contract actions against the United States. See *Sharp*, 798 F.2d at 1523.[5]

---

[5] Petitioners also suggest that the terms of the Standard Contract might themselves be violative of the requirements of the NWPA. See Pet. 19 ("the Standard Contract as drafted by DOE, and as now interpreted by the [court of appeals], delegates to DOE all aspects of performance without any effective accountability, timeliness, or incentives to perform"). At the time that the Standard Contract was promulgated in 1983, an owner or generator of SNF who believed that the terms of the contract were inconsistent with the Act could have obtained court of appeals review of that claim pursuant to 42 U.S.C. 10139(a)(1)(A). The time for filing such a challenge, however, has long since passed. See 42 U.S.C. 10139(c) ("[a] civil action for judicial review described under subsection (a)(1) of this section may be brought not later than the

c. There is also no basis for petitioners' contention that "DOE's actions demonstrate a purposeful DOE policy to avoid its unconditional obligation under the NWPA, despite the fact that DOE has the capability and ability to comply with the statute." Pet. 9; see Pet. 9 n.5. In reaching her preliminary determination that DOE's anticipated delay in performance was "unavoidable," the Contracting Officer analyzed at length the many technical difficulties that had been encountered in the course of an unprecedented scientific and engineering project—a project that has as its goal the safe isolation of highly radioactive waste from the human environment "for at least 10,000 years." Resp. Exh. 6 (Contracting Officer's Preliminary Determination), *supra* note 4, at 4. She also considered the numerous regulatory hurdles that have impeded the project, the legislative actions that have constrained alternative approaches, and the effects of third-party legal challenges to and oversight of project activities. *Id.* at 6-16. Contrary to petitioners' suggestion (see Pet. 9 n.5), the fact that the court of appeals disagreed with DOE concerning the legal consequences of the agency's inability to accept SNF at the present time does not suggest a "purposeful DOE policy" (Pet. 9) of avoiding its statutory obligations.[6]

180th day after the date of the decision or action or failure to act involved"). In any event, petitioners have not alleged that they own or generate SNF, or that they are parties to the Standard Contract. Petitioners would therefore lack standing to challenge the terms of the contract even if the time for filing such a challenge had not expired. See pp. 16-17, *infra*.

[6] Petitioners also rely (Pet. 9 n.5) on DOE's programs under the Atomic Energy Act of 1954, 42 U.S.C. 2011 *et seq.*, to recover weapons-grade spent fuel from research reactors in a number of foreign countries, and to accept in unusual circumstances a limited

2. Even if 42 U.S.C. 10222(a)(5) directly required DOE to begin acceptance of SNF no later than January 31, 1998, petitioners would lack standing to sue to enforce that deadline. Petitioners are States, state utility commissions, and a national association of state regulatory commissions that has never alleged any interest separate from that of its members. Petitioners do not allege that they are owners or generators of spent fuel. This Court has held that a plaintiff in federal court ordinarily "must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth* v. *Seldin*, 422 U.S. 490, 499 (1975). Because any duty to accept SNF that DOE might have is owed to the owners and generators of the fuel, not to States or state regulatory commissions, petitioners cannot satisfy that requirement.

In the court of appeals, petitioners claimed to be suing in their capacity as *parens patriae*. It is well established, however, that a State may not bring a suit in its *parens patriae* capacity against the federal

---

amount of domestic fuel for research purposes. Petitioners suggest that DOE's ability to store such fuel demonstrates an intention to flout its obligation to begin disposal of commercial spent fuel. However, with respect to the spent fuel at issue in this case—*i.e.*, SNF covered by contracts under the NWPA—DOE's authority to begin disposal services is circumscribed by the specific limitations of the Act. Under 42 U.S.C. 10165(b) and 10168(d), DOE may not proceed with an interim storage program for a specific site until after a site for a repository is recommended to the President in accordance with 42 U.S.C. 10134(a), and it may not begin construction of such a facility until the Nuclear Regulatory Commission has issued a license for a repository. See note 2, *supra*. In light of those prohibitions, DOE's ability to accept spent fuel under other authority is not evidence of an intent to avoid its obligations to the contract holders here.

government. See, *e.g.*, *Alfred L. Snapp & Son, Inc.* v. *Puerto Rico*, 458 U.S. 592, 610 n.16 (1982) ("A State does not have standing as *parens patriae* to bring an action against the Federal Government.") (citing *Massachusetts* v. *Mellon*, 262 U.S. 447, 485-486 (1923)).[7] Petitioners have also asserted that their status as purchasers of electricity gives them a cognizable interest in the outcome of this case. They have failed to establish, however, that a judicial order requiring DOE to accept SNF for disposal, or an order allowing utilities to escrow their fee payments, would result in reduced rates for consumers of nuclear-generated power. Cf. *Burton* v. *Central Interstate Low-Level Radioactive Waste Compact Comm'n*, 23 F.3d 208, 210 (8th Cir.), cert. denied, 513 U.S. 951 (1994) (ratepayers lack standing to sue governmental entity that taxes utilities).

3. The government has filed its own petition for a writ of certiorari seeking review of the court of appeals' decision in this case. That petition has been docketed as *United States Dep't of Energy, et al.* v. *Northern States Power Company, et al.*, No. 98-384, and is currently pending before the Court. We argue in *Northern States* that while the court of appeals correctly held in its order denying rehearing that DOE's duty to commence SNF disposal by January 31, 1998, was contractual rather than statutory in nature, its earlier rulings intruded impermissibly upon the jurisdiction of the Court of Federal Claims. If the Court grants the

---

[7] See also *Maryland People's Counsel* v. *FERC*, 760 F.2d 318, 320 (D.C. Cir. 1985) (citing *Mellon*); *Pennsylvania* v. *Kleppe*, 533 F.2d 668, 677 (D.C. Cir. 1976) (same). But see *United States Dep't of Interior* v. *FERC*, 952 F.2d 538, 544 n.4 (D.C. Cir. 1992) (asserting in dicta that state agencies had *parens patriae* standing to sue a federal agency).

petition in No. 98-384, it may wish to grant the petition in the instant case as well. That course of action would ensure that the Court has before it the broadest range of views concerning the nature and scope of DOE's obligations under the NWPA and the proper means of enforcing those obligations.[8]

On balance, however, we believe that the petition in the instant case should be denied even if the petition in No. 98-384 is granted. In our view, the plain terms of 42 U.S.C. 10222(a)(5)(B) unambiguously refute petitioners' contention that DOE is subject to an unconditional statutory obligation to begin acceptance of SNF by January 31, 1998. Petitioners in any event lack standing to pursue that claim. We therefore believe that plenary consideration of the petition in the instant case would be unlikely to enhance the Court's understanding of the issues raised by the government's petition in No. 98-384.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

LOIS J. SCHIFFER
Assistant Attorney General

JOHN A. BRYSON
Attorney

OCTOBER 1998

---

[8] Another possibility would be to hold the present petition pending the Court's decision in No. 98-384, since a decision in favor of the government in No. 98-384 would obviate any need to consider whether the present petition warrants review.

(3)

No. 98-225

FILED
NOV 12 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The Supreme Court Of The United States
October Term, 1998

STATE OF MICHIGAN, ET AL.,

Petitioners,

v.

UNITED STATES DEPARTMENT OF ENERGY, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONERS

FRANK J. KELLEY
Attorney General of Michigan

Thomas L. Casey
Solicitor General of Michigan
Counsel of Record
P.O. Box 30212
Lansing, Michigan 48909
(517) 373-1124

David A. Voges
Henry J. Boynton
Assistant Attorneys General

Attorneys for Petitioners
State of Michigan and Michigan
Public Service Commission

Additional counsel for Petitioners
are listed in the Appendix)

32 pp

TABLE OF CONTENTS

INDEX OF AUTHORITIES ii

ARGUMENT 1

1. DOE's Arguments And The Court Of Appeals' May 5, 1998 Order Are Contrary To The Plain Language And Purpose Of The NWPA 1

2. The Petitioners' Action Has Consistently Sought Enforcement Of The NWPA, And The Court Of Appeals' Failure To Undertake Measures To Require DOE To Perform Its Unconditional Obligation To Take SNF Is An Abdication Of Its Original And Exclusive Jurisdiction Under NWPA §119 4

3. Petitioners Have Standing 5

CONCLUSION 10

INDEX OF AUTHORITIES

CASES

Alaska v United States Dep't of Transp.,
868 F.2d 441 (D.C. Cir. 1989) 7- 8

Alfred L. Snapp & Sons, Inc. v Puerto Rico,
458 U.S. 592 (1982) 6

Beecham v United States,
511 U.S. 368; 114 S. Ct. 1669;
128 L. Ed. 2d 383 (1994) 3

Chiles v Thornburgh,
865 F.2d 1197 (11th Cir. 1989) 6

Indiana Michigan Power Co. v Dep't of Energy,
88 F.3d 1272 (D.C. Cir. 1996) 1-2, 5-6

John Hancock Life Ins. v Harris Bank,
510 U.S. 86 (1993) 3

Lujan v Defenders of Wildlife,
501 U.S. 555 (1992) 8

Massachusetts v Mellon,
262 U.S. 447 (1923) 6

Nevada v Herrington,
777 F.2d 529 (1985) 8

Northern States Power Co. v Dep't of Energy,
128 F.3d 754 (D.C. Cir. 1997) 6

Pacific Gas & Elec. Co. v State Energy Resources Conservation & Dev. Comm'n,
461 U.S. 190 (1983) 7

Washington Utilities and Transp. Comm'n v Fed. Communications Comm'n,
513 F.2d 1142 (9th Cir. 1975),
cert. denied, 423 U.S. 836 (1975) 6-7

STATUTES AND REGULATIONS

Administrative Procedures Act,
5 U.S.C. §706(1) 4

All Writs Act,
28 U.S.C. §1651(a) 4

Declaratory Judgment Act,
28 U.S.C. §2201 4

Federal Power Act,
16 U.S.C. §824(a) 7

Nuclear Waste Policy Act of 1982 ("NWPA"),
42 U.S.C. §§10101 *et seq.* 1-6, 9
§111(b), 42 U.S.C. 10131(b) 3
§119, 42 U.S.C. §10139 4-6
§302(a)(5), 42 U.S.C. §10222(a)(5) 1-3
§302(a)(5)(B), 42 U.S.C. §10222(a)(5)(B) .. 1-4

MISCELLANEOUS

Final Interpretation of Nuclear Waste
Acceptance Issues,
60 Fed. Reg. 21,793 (1995) 6

H.R. Rep. 491, 97th Cong., 2nd Sess., pt. 1, (1982)
p. 28-29, 1982 U.S.C.C.A.N. 3794-3795 3

ARGUMENT

1. DOE's Arguments And The Court Of Appeals' May 5, 1998 Order Are Contrary To The Plain Language And Purpose Of The NWPA.

The U.S. Department of Energy ("DOE"), quoting the court of appeals' May 5, 1998 order, argues that its obligation under the Nuclear Waste Policy Act of 1982, 42 U.S.C. §§10101 *et seq.* ("NWPA") is merely to include in contracts the statutory requirement that DOE begin to accept high level radioactive waste and spent nuclear fuel (collectively "SNF") by January 31, 1998, not that DOE must actually comply with this deadline. DOE Brief, p.12. To the contrary, the plain language of NWPA §302(a)(5), 42 U.S.C. §10222(a)(5), and (B), 42 U.S.C. §10222(a)(5)(B), when read as a whole, contains not one, but two Congressional commands: that DOE begin to accept SNF not later than January 31, 1998, and that this mandate also be placed in a contract.

The statutory command setting the deadline in subsection (B) is unequivocal, as the court of appeals held in its prior, unappealed decision in *Indiana Michigan Power Co. v Dep't of Energy*, 88 F.3d 1272 (D.C. Cir. 1996):

> Congress . . . directed the beginning of the Secretary's duty as "not later than January 31, 1998," without qualification or condition. The only limitation placed on the Secretary's duty under (B) is that that duty is "in

> return for the payment of fees established by this section." The Department's treatment of this statute is not an interpretation but a rewrite. It not only blue-pencils out the phrase "not later than January 31, 1998," but destroys the *quid pro quo* created by Congress.

Pet. 35a-36a. The court of appeals in *Indiana Michigan* thus concluded that:

> Under the plain language of the statute, the utilities anticipated fees "in return for [which] the Secretary" had a commensurate duty. She was to begin disposing of the high level radioactive waste of SNF by a *day certain*.

Pet. App. 36 (emphasis added).

The requirement in NWPA §302(a)(5) that the statutory deadline of January 31, 1998 be included in contracts in no way supports DOE's theory that this deadline can be made conditional upon or qualified by other terms in the contract. The reasonable interpretation is that the deadline was placed in the contract to buttress the statutory deadline and to secure the statutory bargain, i.e., the *quid pro quo*, struck by Congress. The contract reference in NWPA §302(a)(5) cannot reasonably be read to countermand Congress' clear mandate in subsection (B) for a January 31, 1998 deadline or to authorize a major programmic failure of the NWPA. In short, DOE's argument once again blue

pencils out the phrase "not later than January 31, 1998" and destroys the *quid pro quo* created by Congress.

In subsection (B), Congress legislated a schedule which imposes on DOE an unconditional obligation to take SNF by a day certain, January 31, 1998. The NWPA must be read as a whole and NWPA §302(a)(5) cannot be read to the exclusion of subsection (B) or the rest of the act. See, *Beecham v United States*, 511 U.S. 368; 114 S. Ct. 1669; 128 L. Ed. 2d 383, 388 (1994) ("The plain meaning that we seek to discern is the plain meaning of the whole statute, not of isolated sentences"); *John Hancock Life Ins. v Harris Bank*, 510 U.S. 86, 94-95 (1993) ("we examine first the language of the governing statute, guided not by a 'single sentence or member of a sentence, but look[ing] to the provisions of the whole law, and to its object and policy'"). In addition to being contrary to the plain meaning of the Act, DOE's argument also conflicts with the purposes of the NWPA and its legislative history.

Congress meant what it said when it created an unconditional obligation for DOE to begin to accept SNF by January 31, 1998. The deadline established in that subsection (B) was *key* to the success of the federal waste disposal program since federal government inaction was the major failing of the nuclear waste disposal program for thirty years prior to the NWPA's enactment.[1] In the NWPA, Congress told DOE it had

---

[1] "The failure of the government to provide a permanent waste disposal facility during more than 30 years of federal nuclear activities is unmitigated." ... "[T]here is a solid consensus on major elements of the federal program, *and on the need for legislation to solidify a program and keep it on track.*" H.R. Rep. 491, 97th Cong.,

16 years to get ready to begin taking the SNF. Now, sixteen years later, the DOE is again attempting to rewrite subsection (B) to nullify the deadline set by Congress. Unless this Court acts, the nation will be deprived of the very certainty that Congress sought to provide in the NWPA when it mandated that the DOE had an unconditional obligation to take SNF beginning not later than January 31, 1998.

2. The Petitioners' Action Has Consistently Sought Enforcement Of The NWPA, And The Court Of Appeals' Failure To Undertake Measures To Require DOE To Perform Its Unconditional Obligation To Take SNF Is An Abdication Of Its Original And Exclusive Jurisdiction Under NWPA §119.

DOE erroneously argues that "DOE's obligation to accept SNF by January 31, 1998, was contractual rather than statutory", that the sole remedy for an alleged breach of contract is a claim for money damages under the Tucker Acts, and that "specific performance is not an available remedy in contract actions against the United States." DOE Brief, 14.

DOE's arguments ignore the critical fact that this litigation never was a contract action or a claim for damages. Rather, Petitioners' action was commenced pursuant to NWPA §119, 42 U.S.C. §10139, and related

---

2nd Sess., pt. 1 at 28-29 (1982), reprinted in 1982 U.S.C.C.A.N. at 3794-3795 (emphasis added). Additionally, NWPA 111(b), 42 U.S.C. 10131(b), expressly states that among the NWPA's purposes are to establish federal responsibility and a *definite* federal policy. (Emphasis added).

statutes[2] to invoke the court of appeals' "original and exclusive" jurisdiction to obtain remedies to *enforce the statute* and the Court's unequivocal holding in *Indiana Michigan*. The various statutes relied upon by Petitioners clearly gave the court of appeals the duty and power to adopt remedies to further DOE's compliance with the NWPA.

The court of appeals' failure to undertake measures to enforce the January 31, 1998 deadline constitutes an abdication of that court's "original and exclusive jurisdiction" to review and remedy DOE's actions and failures to act under NWPA §119. That Court severely limited its review duties and remedies by: (1) adopting in its May 5 order, the hyper-technical and illogical interpretation that the NWPA required a statutory deadline for accepting SNF but never required performance of this duty, and (2) dismissing Petitioners' broad-based petition in its July 2 order, thereby ignoring its duty and the various remedies (e.g. escrow, special master, filed plan for compliance) sought by Petitioners to remedy DOE's refusal to perform.

3. Petitioners Have Standing.

The DOE's claim that the Petitioners lack standing should be rejected for a number of reasons. First, the Petitioners were full parties in *Indiana Michigan*, in which Petitioners challenged the

---

[2]The Petition for Review in the court of appeals invoked jurisdiction under NWPA §119, Administrative Procedures Act, 5 U.S.C. §706(1), the Declaratory Judgment Act, 28 U.S.C. §2201, and the All Writs Act, 28 U.S.C. §1651(a).

lawfulness of the DOE's *Final Interpretation of Nuclear Waste Acceptance Issues*, 60 Fed. Reg. 21,793 (1995).[3] Because DOE failed to undertake any actions consistent with *Indiana Michigan*, Petitioners returned to the court in the consolidated action in *Northern States Power Co. v Dep't of Energy*, 128 F.3d 754 (D.C. Cir. 1997) to enforce the court's mandate.

Second, the Petitioners have standing as *parens patriae*. *Citing Alfred L. Snapp & Sons, Inc. v Puerto Rico*, 458 U.S. 592, 610 n.16 (1982), and *Massachusetts v Mellon*, 262 U.S. 447, 485-486 (1923), DOE argues that a State may not bring a *parens patriae* action against the Federal government. However, DOE overstates the holdings in these cases. As the Eleventh Circuit stated "the *Mellon* Court did 'not go so far as to say that a state may never intervene by suit to protect its citizens against any form of unconstitutional acts of Congress.'" *Chiles v Thornburgh*, 865 F.2d 1197, 1209 (11th Cir. 1989).

The States' ability to bring a *parens patriae* action against a Federal agency was expressly recognized by the Ninth Circuit in *Washington Utilities and Transp. Comm'n v Fed. Communications Comm'n*, 513 F.2d 1142 (9th Cir. 1975), *cert. denied*, 423 U.S. 836 (1975). *Washington Utilities* is particularly relevant since it found a state commission "injured" by a final FCC order that could result in higher telephone rates for state residents. 513 F.2d at 1149. As such, the court

---

[3]Furthermore, the NWPA §119 evidences no intent to limit court relief to contract holders or otherwise to curtail Petitioners' standing to contest DOE's action in issuing an administrative determination in a publicly noticed comment proceeding regarding DOE's legal obligations under the NWPA.

reasoned that the state commission was obligated to protect the interests of its telephone users and that an FCC order that would raise rates injured the state by interfering with the agency's ability to meet this obligation. *Id.*

The States, Petitioners here, as in *Washington Utilities*, rely upon a federal statute and seek to vindicate the Congressional will by preventing its violation by the federal agency charged with its enforcement. The States have a statutory duty to establish just and reasonable retail electric rates in their respective jurisdictions. In fact, Congress has prohibited federal regulation of the retail sale of electricity. 16 U.S.C. §824(a). Because the setting of retail electric rates, which includes the scrutinizing of utility costs so as to allow only those costs that are reasonable and prudent, is within the exclusive province of the States (and not the federal government) the States have a *parens patriae* role in protecting the economic interests of its citizens. *Id.*

In *Pacific Gas & Elec. Co. v State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 207 (1983), this Court upheld a California state statute regulating the construction of nuclear plants. Because ratemaking and plant-need concerns were deemed to remain in *state* hands, the Court held that the California statute was *outside* the *federally*-occupied field of nuclear safety regulation. This Court accepted the state's avowed non-safety, *economic* purpose as the rationale for enacting the statute. 461 U.S. at 213-214. Thus, in the area of ratemaking, the States have a cognizable sovereign interest, and the DOE's inaction threatens to

diminish the States' ability to set just and reasonable retail electric rates for its citizens. Similarly, the D.C. Circuit in *Alaska v United States Dep't of Transp.*, 868 F.2d 441, 443 n. 1 (D.C. Cir. 1989), observed that "[t]he precise contours of *parens patriae* standing... are somewhat unclear." That decision concluded, however, that "[i]nasmuch as the States' sovereign interest in law enforcement [w]as sufficient to support standing, [it] need not delve into the issue of *parens patriae* standing."

Third, the States also have standing to bring this action in their proprietary capacity as significant purchasers of nuclear generated energy, since they have incurred "injury in fact" due to DOE's failure to act. *Lujan v Defenders of Wildlife*, 501 U.S. 555, 560 (1992); *Nevada v Herrington*, 777 F.2d 529, 534 (1985). DOE's delay and inaction have exposed the States and their ratepayers to unnecessary, additional charges in rates for nuclear generated energy. Such charges result in higher electric rates based, in part, on utility payments to the Nuclear Waste Fund, increased on-site storage, increased decommissioning costs, and additional charges caused by premature shutdowns of those plants lacking adequate on-site storage. Thus, the economic harm to the States and their ratepayers posed by any delay in DOE's performance is both actual and imminent.

Fourth, the States have a direct economic and safety interest in ensuring that nuclear waste is properly stored and disposed of under the federal program. SNF is presently stored at nuclear plants at 73 locations in over 33 states. If the federal government

fails in its duties to dispose of SNF, and the utility industry financially or legally restructures itself away from its nuclear waste liabilities, the States themselves may be called upon to bear the brunt of the nuclear waste disposal problem.[4] The States are thus entitled to utilize every means available, including this litigation, to seek enforcement of the NWPA.

Finally, DOE's position on standing is based on a plain factual error (*viz.*, that no Petitioners are signatories to the Standard Contract with DOE). Among the Petitioners in this case is the Public Systems Group, which includes the American Public Power Association ("APPA"), the national service organization representing publicly-owned electric utilities throughout the United States. Several members of the APPA *are* signatories to the Standard Contract.[5]

---

[4]The States' experience with polluted "brown-field sites" left by other bankrupt industries demonstrates the reality of this risk. In Michigan alone, voters on November 3, 1998 approved a tax-supported $675 million dollar bond proposal to clean up polluted "brown-field" industrial sites left abandoned by defunct industries.

[5]Members of APPA that are signatories to the Standard Contract are: Nebraska Public Power District; Omaha Public Power District; New York Power Authority; Sacramento Municipal Utility District; and Washington Public Power Supply System.

CONCLUSION

The Petition for Certiorari should be granted.

Respectfully submitted,

FRANK J. KELLEY
Attorney General of Michigan

Thomas L. Casey
Solicitor General of Michigan
Counsel of Record
P.O. Box 30212
Lansing, Michigan 48909
(517) 373-1124

David A. Voges
Henry J. Boynton
Assistant Attorneys General

Attorneys for Petitioners
State of Michigan, and Michigan
Public Service Commission

Dated: November 12, 1998

(Additional counsel for Petitioners
are listed in the Appendix)

APPENDIX

APPENDIX

STATE OF MINNESOTA
MINNESOTA DEPARTMENT OF PUBLIC SERVICE
MINNESOTA PUBLIC UTILITIES COMMISSION

Hubert H. Humphrey III, Attorney General
J. Jeffrey Oxley, Assistant Attorney General
445 Minnesota Street, Suite 1200
St. Paul, MN 55101-2103

Don L. Keskey, By Special Appointment
225 South Troy St, Suite 230
Royal Oak, MI 48067
Telephone: (248) 584-0900
Fax: (248) 584-0975

ALABAMA PUBLIC SERVICE COMMISSION

Lester M. Bridgeman
MILLER, HAMILTON, SNIDER & ODOM
245 State Street
P.O. Box 46
Mobile, AL 36601-0046
Telephone: (334) 432-1414
Fax: (334) 433-4106

ARIZONA CORPORATION COMMISSION

Eric A. Eisen
Eisen Law Office
10028 Woodhill Road
Bethesda, MD 20817
Telephone: (301) 469-8590
Fax: (301) 469-8120

Paul Bullis, Chief Counsel
Legal Division
Arizona Corporation Commission
1200 West Washington
Phoenix, AZ 85007
Telephone: (602) 542-3402
Fax: (602) 542-4870

STATE OF ARKANSAS

Winston Bryant, Attorney General
Shirley E. Guntharp, Deputy Attorney General
Charles L. Moulton, Assistant Attorney General
323 Center Street, Suite 200
Little Rock, AR 72201-2610
Telephone: (501) 682-2007
Fax: (501) 682-8084

ARKANSAS PUBLIC SERVICE COMMISSION

Mary W. Cochran, General Counsel
1000 Center Street
P.O. Box 1000
Little Rock, AR 72203-0400
Telephone: (501) 682-5846
Fax: (501) 682-5731

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Peter Arth, Jr.
Arocles Aguilar
Harvey Y. Morris
505 Van Ness Avenue
San Francisco, CA 94102
Telephone: (415) 703-1086
Fax: (415) 703-2262

STATE OF CONNECTICUT AND THE CONNECTICUT DEPARTMENT OF PUBLIC UTILITY CONTROL

Richard Blumenthal, Attorney General
Robert S. Golden, Jr., Assistant Attorney General
10 Franklin Square
New Britain, CT 06051
Telephone: (860) 827-2683
Fax: (860) 827-2613

STATE OF DELAWARE

M. Jane Brady, Attorney General
Michael F. Foster, State Solicitor
Charles F. Walker, Deputy Attorney General
Kevin P. Maloney, Deputy Attorney General
Department of Justice
820 N. French Street
Wilmington, DE 19801
Telephone: (302) 577-8400
Fax: (302) 577-6630

STATE OF FLORIDA

Michael A. Gross, Assistant Attorney General
Special Projects Section
Office of the Attorney General
PL-01 The Capitol
Tallahassee, FL 32399-1050
Telephone: (850) 414-3300
Fax: (850) 488-6589

FLORIDA PUBLIC SERVICE COMMISSION

Robert D. VanDiver, General Counsel
Richard C. Bellak, Associate General Counsel
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0862
Telephone: (850) 413-6248
Fax: (850) 413-7180

GEORGIA PUBLIC SERVICE COMMISSION

Thurbert E. Baker, Attorney General
Alan Gantzhorn, Senior Assistant Attorney General
40 Capitol Square, S.W.
Atlanta, GA 30334-1300
Telephone: (404) 656-7542
Fax: (404) 651-6341

STATE OF ILLINOIS

James E. Ryan, Attorney General
Carole R. Doris, Chief, Department of Public Advocacy
100 West Randolph Street, 12th Floor
Chicago, IL 60601
Telephone: (312) 814-3000
Fax: (312) 814-3806

ILLINOIS COMMERCE COMMISSION

Myra L. Karegianes, General Counsel
James E. Weging, Special Assistant Attorney General
Illinois Commerce Commission
160 N. LaSalle Street
Suite C-800
Chicago, IL 60601
Telephone: (312) 793-2877
Fax: (312) 793-1556

STATE OF INDIANA

Daniel B. Dovenbarger, Deputy Attorney General
402 W. Washington Street
Indianapolis, IN 46204
Telephone: (317) 233-6313
Fax: (317) 232-7979

STATE OF IOWA

Ben Stead
Iowa Department of Justice
Office of Consumer Advocate
4th Floor, Lucas State Office Building
Des Moines, IA 50319
Telephone: (515) 281-5984
Fax: (515) 242-6564

IOWA UTILITIES BOARD

Diane Munns, General Counsel
Iowa Utilities Board
Department of Commerce
350 Maple Street
Des Moines, IA 50319
Telephone: (515) 281-3448
Fax: (515) 242-5081

STATE OF KANSAS

Carla J. Stovall, Attorney General
John W. Campbell, Senior Deputy Attorney General
Kansas Judicial Center
Second Floor
Topeka, KS 66612-1597
Telephone: (785) 296-2215
Fax: (785) 296-6296

KANSAS CORPORATION COMMISSION

Glen W. Froelich, Assistant General Counsel
Kansas Corporation Commission
1500 SW Arrowhead Road
Topeka, KS 66604-4027
Telephone: (785) 271-3119
Fax: (785) 271-3167

COMMONWEALTH OF KENTUCKY

A. B. Chandler, III, Attorney General
James J. Grawe, Assistant Attorney General
State Capitol
700 Capitol Avenue
Frankfort, KY 40602-2000
Telephone: (502) 696-5300
Fax: (502) 564-2894

LOUISIANA PUBLIC SERVICE COMMISSION

Michael R. Fontham
Noel J. Darce
STONE, PIGMAN, WALTHER, WITTMANN & HUTCHINSON
546 Carondelet Street
New Orleans, LA 70130-3588
Telephone: (504) 581-3200
Fax: (504) 581-3361

Eve Kahao Gonzalez
General Counsel
Louisiana Public Service Commission
P.O. Box 91154
Baton Rouge, LA 70821-9154

STATE OF MAINE

Andrew Ketterer, Attorney General
Paul Stern, Assistant Attorney General
6 State House Station
Augusta, ME 04333-0006
Telephone: (207) 626-8568
Fax: (207) 287-3145

STATE OF MARYLAND

J. Joseph Curran, Jr., Attorney General
M. Brent Hare, Assistant Attorney General
Power Plant Research Program
580 Taylor Avenue
Annapolis, MD 21401
Telephone: (410) 260-7743
Fax: (410) 260-8670

MARYLAND PUBLIC SERVICE COMMISSION

Bryan G. Moorhouse, General Counsel
Susan S. Miller, Assistant General Counsel
Maryland Public Service Commission
6 St. Paul Centre
Baltimore, MD 21202
Telephone: (410) 767-8036
Fax: (410) 333-6495

COMMONWEALTH OF MASSACHUSETTS

Scott Harshbarger, Attorney General
Charles M. Wyzanski, Assistant Attorney General
Trial Division
200 Portland Street
Boston, MA 02114
Telephone: (617) 727-2200, ext 3093
Fax: (617) 727-3076

MISSISSIPPI PUBLIC SERVICE COMMISSION

George M. Fleming
Patricia L. Transham
Public Utilities Staff
Walter Sillers State Office Building
P.O. Box 1174
Jackson, MS 39215-1174
Telephone: (601) 961-5490
Fax: (601) 961-5804

NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS

Charles D. Gray, General Counsel
James Bradford Ramsay, Assistant General Counsel
National Association of Regulatory Utility Commissioners
Old Post Office Pavilion, Suite 603
1100 Pennsylvania Ave, N.W.
P.O. Box 684
Washington, D.C. 20044-0684
Telephone: (202) 898-2208
Fax: (202) 898-2213

STATE OF NEBRASKA

Don Stenberg, Attorney General
L. Steven Grasz, Deputy Attorney General
Linda L. Willard, Assistant Attorney General
2115 State Capitol
Lincoln, NE 68509-8920
Telephone: (402) 471-2757
Fax: (402) 471-3297

STATE OF NEW HAMPSHIRE

Wynn E. Arnold, Assistant Attorney General
Civil Bureau
33 Capitol Street
Concord, NH 03301-6397
Telephone: (603) 271-3658
Fax: (603) 271-2110

OFFICE OF CONSUMER ADVOCATE
STATE OF NEW HAMPSHIRE

James R. Anderson, Assistant Consumer Advocate
117 Manchester St.
Concord, NH 03301
Telephone: (603) 271-1172
Fax: (603) 271-1177

STATE OF NEW JERSEY BOARD OF PUBLIC UTILITIES

Peter Verniero, Attorney General
Caroline Vachier, Deputy Attorney General
Elise Goldblat, Deputy Attorney General
Division of Law
124 Halsey Street 5th Floor
P.O. Box 45029
Newark, NJ 07101
Telephone: (973) 648-4866
Fax: (973) 648-7156

NEW YORK STATE PUBLIC SERVICE COMMISSION

Lawrence G. Malone, Solicitor
Cheryl L. Callahan
Three Empire State Plaza, 17th Floor
Albany, NY 12243-1350
Telephone: (518) 474-6513
Fax: (518) 473-7081

NORTH CAROLINA UTILITIES COMMISSION

Sammy R. Kirby, Deputy General Counsel
P.O. Box 29510
Raleigh, NC 27626-0510
Telephone: (919) 733-0834
Fax: (919) 733-7300

NORTH DAKOTA PUBLIC SERVICE COMMISSION

Charles E. Johnson, Special Assistant Attorney General
William W. Binek, Special Assistant Attorney General
State Capitol
Bismarck, ND 58505
Telephone: (701) 328-4078
Fax: (701) 328-2410

PUBLIC UTILITIES COMMISSION OF OHIO

Betty D. Montgomery, Attorney General
Jeffrey S. Sutton, State Solicitor
Duane W. Luckey, Assistant Attorney General
Steven T. Nourse, Assistant Attorney General
Public Utilities Section
180 East Broad Street
Columbus, OH 43215-3793
Telephone: (614) 644-8762
Fax: (614) 644-8764

PENNSYLVANIA PUBLIC UTILITY COMMISSION

Lawrence F. Barth, Assistant Counsel
Karen O. Moury, Deputy Chief Counsel
Bodran R. Pankiw, Chief Counsel
Room 203, North Office Building
P.O. Box 3265
Harrisburg, PA 17105-3265
Telephone: (717) 772-8579
Fax: (717) 783-3458

PUBLIC SYSTEMS GROUP, CONSISTING OF AMERICAN PUBLIC POWER ASSOCIATION, MASSACHUSETTS MUNICIPAL WHOLESALE ELECTRIC COMPANY, CONNECTICUT MUNICIPAL ELECTRIC ENERGY COOPERATIVE, INC., PIEDMONT MUNICIPAL POWER AGENCY, BRAINTREE, MASSACHUSETTS ELECTRIC LIGHT DEPARTMENT, CITY OF ANAHEIM, CALIFORNIA

Gary J. Newell
Frances E. Francis
SPIEGEL & McDIARMID
Suite 1100
1350 New York Avenue, N.W.
Washington, D.C. 20005-4798
Telephone: (202) 879-4000
Fax: (202) 393-2866

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

Jeffrey B. Pine, Attorney General
Paul J. Roberti, Special Assistant Attorney General
150 South Main Street
Providence, RI 02903
Telephone: (401) 274-4400, ext 2231
Fax: (401) 273-4270

PUBLIC SERVICE COMMISSION OF SOUTH CAROLINA

F. David Butler, General Counsel
Florence P. Belser, Staff Counsel
P.O. Drawer 11649
Columbia, SC 29211
Telephone: (803) 737-5117
Fax: (803) 737-5246

SOUTH DAKOTA PUBLIC UTILITIES COMMISSION

Rolayne Ailts Wiest, Special Assistant Attorney General
500 East Capitol Avenue
State Capitol Building
Pierre, SD 57501-5070
Telephone: (605) 773-3201
Fax: (605) 773-3809

STATE OF VERMONT and
THE VERMONT PUBLIC SERVICE BOARD

William H. Sorrell, Attorney General
J. Wallace Malley, Jr., Deputy Attorney General
Mary McCabe, Assistant Attorney General
Office of the Attorney General
109 State Street
Montpelier, VT 05609-1001
Telephone: (802) 828-3171
Fax: (802) 828-2154

COMMONWEALTH OF VIRGINIA

Mark L. Earley, Attorney General
Roger L. Chaffee, Senior Assistant Attorney General
Carl Josephson, Assistant Attorney General
900 East Main Street
Richmond, VA 23219
Telephone: (804) 225-4004
Fax: (804) 786-0034

PUBLIC SERVICE COMMISSION OF WISCONSIN

Edward S. Marion, Chief Counsel
David Ludwig, Attorney
Electric Division
610 N. Whitney Way
P.O. Box 7854
Madison, WI 53707-7854
Telephone: (608) 266-5621
Fax: (608) 266-3957